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A pleasing exception to the general rule which regards a man as too old for effective work after he has reached the age of seventy, is furnished by United States District Judge, Henry W. Blodgett, of the Northern Illinois district. In 1870 Judge Blodgett was appointed to that position. Recently he reached the age of seventy years. As is well known to the legal fraternity, the law provides that a federal judge who reaches that age, after having served ten years on the bench, may retire upon a pension equal to his salary, and Judge Blodgett has been asked whether he intended to avail himself of the privilege. He replies that he does not; his health is good, he feels perfectly competent to keep at work, and he has grown so used to work that he should not know how to get along without it. We agree with him fully as to his ability to attend to the work of his court. There is to-day no more vigorous judge, young or old, on the federal bench than Judge Blodgett, and we applaud his determination to continue in the discharge of his duties until he is actually incapacitated.

IT is said that the State of South Dakota has of late been overwhelmed by people from other States seeking for divorce, and the statement has been going the rounds of the press that a certain prominent lady in one of the Eastern States, whose domestic infelicity has become a matter of public notoriety, is about to start for that State with a view to obtaining a divorce there. For some time past its courts, it is reported, have been converted into divorce mills whose popularity rivals many of the older grinding establishments. The reason for this appears to be not so much the liberality of the statute as to causes for which a divorce may be granted, as the brevity of the period of residence—ninety days only being required before an application can be filed. The obvious remedy for the evil would be to increase the required period to at least one year, as in most of the States, and also to require some evidence that the petitioner is not a resident for divorce purposes only. It is the plain duty of every State to discourage as much as possible the formation of divorce colonies. Such contentions should be tried and decided in the localities where the parties are really resident and where the merits of the case are more readily arrived at. And we dare say that the marital troubles of actual residents of South Dakota can furnish sufficient occupation for the judicial machinery without opening its doors to divorce seekers from all other sections of the country.

IF the *Omaha Mercury* has reported correctly a decision rendered by a Nebraska judge, and if that decison should be allowed to stand, which is not probable, that State may yet share with South Dakota in the popularity of its divorce courts, and Nebraska will be the mecca for mismated couples, who have in mind the breaking of the connubial knot, but without sufficient grounds to accomplish that result in other jurisdictions. The gist of the decision referred to is that though a couple may be lawfully married in and according to the laws of another State, yet if such marriage is illegal according to the laws of Nebraska, it will be so declared by the courts of the latter State. It appears in the case that the parties were legally married according to the laws of Missouri. But the woman had not been divorced from her first husband six months at the time of her marriage with this one, as required by Nebraska law, and therefore, according to this august court, the marriage was illegal in the latter State. In other words, though legally man and wife in Missouri, yet the minute they crossed the line and came into Nebraska they were no longer, in legal contemplation, man and wife. The effect of this is to declare that every marriage in the United States not in strict accordance with the forms of the Nebraska statutes would be illegal in that State. All of which, of course, is absurd.

NOTES OF RECENT DECISIONS.

ACCIDENT INSURANCE—SUN-STROKE.—Judge Phillips, of the United States District Court, Western District of Missouri, in the case of Dozier v. Fidelity and Casualty Co., 46 Fed. Rep. 446, holds that "sun-stroke or heat pros-

tration," contracted by the decedent in the course of his ordinary duty as a supervising architect, is a disease, and does not come within the terms of a policy of insurance against bodily injuries, sustained through external, violent, and accidental means, but expressly excepting "any disease or bodily infirmity." This precise question does not appear to have been passed upon by any American court, but may be regarded as settled in the negative in England, by the opinion of Chief Justice Cockburn, in Sinclair v. Assurance Co., 3 El. & El. 478. According to this high authority, a disease produced by a known cause cannot be considered as accidental. Judge Phillips, says:

This conclusion has been accepted as authoritative by text-writers. Bliss, Ins. § 399; May, Ins. (3d ed.) § 519. If sun-stroke or heat prostration is properly classified among diseases, it is expressly excepted from the operation of this policy. It is discussed in works on Pathology under the head of diseases of the brain. Niemeyer in his work on Practical Medicine (vol. 2, pages 181, 182), treats of it under the head of "Diseases of the Brain." He asserts that the investigations and experiments of so renowned a specialist as Obernier have entirely exploded the once common notion that sun-stroke, or *insolatio*, depends on hyperæmia of the brain, induced by the action of the sun's rays on the head. The rays of the sun are not essential to it. "It is now known that in this disease there is a serious derangement of the heat-producing function, and a great rise in the bodily temperature, which, in extreme case, may reach 109 degrees or 110 degrees Fahr." And he concludes that, while nothing is yet known of the anatomical lesions upon which sun-stroke depends, yet "the disorder has a definite material basis." A standard Encyclopædia (Britannica, vol. 22, p. 666) terms it a "disease," and prescribes its methods of treatment. From this and other standard works we collate the following facts: That it is a term applied to the effects upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air. "Although most frequently observed in tropical regions, this disease also occurs in temperate climates during hot weather. A moist condition of the atmosphere, which interferes with the cooling of the overheated body, greatly increases the liability to suffer from this ailment." The common notion that sun-stroke or "heat prostration," as it is termed in the petition, comes like a stroke of lightning from a piercing ray of the sun, is utterly at fault. It affects persons frequently during the night. It often results from overcrowding in quarters, as in the case of soldiers in barracks, and to persons in poorly ventilated rooms. Also persons whose employment exposes them to heat more or less intense, such as laundry workers and stokers, are apt to suffer from this in hot seasons. "Causes calculated to depress the health, such as previous disease, particularly affections of the nervous system, anxiety, worry, or overwork, irregularities in food, and, in a marked degree, intemperance, have a predisposing influence; while persons uncleanliness, which prevents, among other things, the healthy action of the skin, the wearing of tight garments, which impede alike the functions of the heart and lungs, and living in overcrowded and insanitary dwellings, have an equally hurtful tendency." Longmore, in his reports of cases occurring in the British army in India, where it is quite prevalent, attributes it much to the foul air and badly ventilated quarters, and he also speaks of its pathological conditions. In all its forms, ranging from "heat syncope" and "heat apoplexy" to "ardent thermic fever," it is subjected to medical treatment as a disease, and its fatality is estimated at 40 to 50 per cent. With what propriety for accuracy, therefore, can this malady be termed an accident, any more than cholera, small-pox, or yellow fever, or apoplexy? It may be an accident that a person is exposed to it, but the conditions under which the human system may be affected by it, certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance. The term "accident," as used in the policy, is presumed to be employed in its ordinary, popular sense, which means "happening by chance;" "unexpectedly taking place;" "not according to the usual course of things." So that a result ordinarily, naturally, flowing from the conduct of the party cannot be said to be accidental, even where he may not have foreseen the consequences.

It is not deemed essential to a vindication of the correctness of the conclusion reached to review the various American decisions illustrating the application of the term "accidental" employed in such policies further than to note the palpable distinction between them and the case at bar. Death by drowning is accidental, as there is present the *vis major*, external and violent, producing asphyxia, and in the act producing the injury there is something unforeseen unexpected, and unusual. May, Ins. § 516. In Association v. Barry, 131 U. S. 100, 9 Sup. Ct. Rep. 755, the assured, after two other persons had jumped from a platform five feet from the ground with safety, also jumped therefrom, followed, as to him, with serious consequences, producing a stricture of the duodenum, from which death ensued. In that case the deceased intended to, and thought that he would, alight safely, and it was a question for the jury to say whether or not it was an accident that he did not. The court say: "If the death is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

In Association v. Newman, 84 Va. 52, 3 S. E. Rep. 805, the assured was found dead in his bed early in the morning, caused evidently by inhaling coal gas. The case turned upon the question whether or not this gas was a poison or poisonous substance, within the meaning of the exception contained in the policy. The controversy among the experts was as to whether death resulted from carbonic oxide or carbonic acid, and as to their resultant poisonous power, both causing death by suffocation. Such a death clearly came within the term "accidental," and it was left to the jury to determine whether or not carbonic oxide is poisonous within the meaning and intent of the words "poison" and "poisonous" as used in the policy. This course was pursued by the court in view of the conflict in the testimony as to whether such gases were strictly "poisonous" in the ordinary acceptation to be imputed to such term in the policy. These cases do not present the question of an accident and disease as in the case at bar. In Bacon v. Association (Ct. App. N. Y. Oct. 14, 1890), 25 N. E. Rep. 399, it was held that

death resulting from a malignant pustule, caused by the infliction upon the body of diseased animal matter containing *bacillus anthrax*, is death from disease, and not within the terms of an accident policy similar to the one under consideration. It was likened to what is called "wool sorter's disease," because it happens to people who handle wool and hides, such as tanners, butchers, and herdsmen. Although the medical experts admitted that this species of malady belonged to pathology, yet they attempted to except this instance from the classification of diseases by defining it as "a pathological condition, and succumbing of the body to the infliction of this particular poison." But the court held that a pathological condition "means neither more nor less than a diseased condition of the body," and therefore, as the policy expressly excepted bodily infirmity or disease, there could be no recovery. The court say: "No abrasion of the skin is needed to produce the contact of the *bacilli*, and what follows from such contact seem to be as plainly a disease as in the case of small-pox or typhoid fever." Sun-stroke seems to be recognized by the courts in New York as a disease. In Boos v. Insurance Co., 6 Thomp. & C. 364, the contention was as to whether the court should take judicial cognizance of the fact that sun-stroke was "a serious disease," within the terms of the policy. There seemed to be no question made that it was not a disease, but whether the fact of its seriousness should be left to the determination of the jury. Courts may take cognizance of facts generally known and recognized in nature, science, and history. They will take notice of processes in art and science, the results of which are matters of common knowledge. Brown v. Piper, 91 U. S. 37. They will take notice of the art of photography, and its production of correct likenesses. Udderzook's Case, 76 Pa. St. 340; Cozzens v. Higgins, 1 Abb. Dec. 451. Also, that coal oil is inflammable. State v. Hayes, 78 Mo. 318. So should courts take notice that fever in its multiform grades is a disease, and I apprehend, in view of the universal assignment of apoplexy in pathology among the diseases of the brain, that it would not be seriously questioned that courts in trials before juries may assume it to be a bodily disease.

LIABILITY OF ESTATE FOR WIFE'S FUNERAL EXPENSES.—In *In re* Stewart, the New Jersey Court of Chancery held that the estate of a judicially declared lunatic is legally liable for the funeral expenses of his wife, and this, although she left a will directing that such expenses should be defrayed out of her separate estate. The court, however, intimates that, under the circumstances, the husband's estate might in equity have a claim for reimbursement against the wife's estate. Bird, V. C., says:

The question is whether, since the wife had a separate estate of her own, and made provision by her will for the payment of her debts and funeral expenses, the guardian of the lunatic was justified in paying the funeral expenses of the wife or not. Under the common law, the husband was undoubtedly liable to defray all necessary expenses incident to the decent burial of his wife (Schouler, Husb. & Wife, sec. 412. See notes Manby v. Scott, 3 Smith, Lead. Cas., 1762; Jenkins v. Tucker, 1 H. Bl., 91). This is founded upon the principle of law which holds that the husband is liable for all things necessary for the comfortable support and maintenance of the wife consistent with his station or condition in life (Manby v. Scott, 3 Smith, Lead. Cas., 1714; Montague v. Benedict, *Id.* 1743; Seaton v. Benedict, *Id.*, 1749, and notes; Cunningham v. Erwin, 7 Serg. & R. 247; Cunningham v. Reardon, 98 Mass. 538; Morrison v. Holt, 42 N. H. 478). This liability continues, notwithstanding the insanity of the husband (see notes to the above case; Manby v. Scott, *supra*, 1767). The language of the author is: "The obligation of the husband to maintain his wife being a duty imposed by the law, and resulting from the relation between them, does not cease upon the husband's becoming insane. He continues liable for necessaries supplied to his wife, in the same way and on the same grounds as a husband who has failed to supply her with them." The same author says that it is accordingly so held where the wife's separate allowance is sufficient (Turner v. Rookes, 10 Adol. & E. 47). The husband being liable for necessaries furnished the wife, and being so liable after he becomes insane, and being liable for the expenses of her decent burial, I cannot but conclude that such liability continues after he becomes insane, even though the wife has a separate estate, and may have directed by her last will that her funeral expenses be paid. Such, undoubtedly, was the common law. I can find nothing in the statute that even by implication changes or qualifies the common law in this respect. Therefore I conclude that the guardian of the lunatic has a right to be reimbursed out of the moneys now in his hands, being the proceeds of the sale of real estate of the lunatic. This does not dispose of the question whether or not it is or will become the duty of the guardian to seek to enforce the claim for these funeral expenses against the estate of the wife. There is, no doubt, strong reason for insisting that, since the wife had a separate estate, and by her will charges it with the payment of her funeral expenses, that in equity, if not in law, she intended to exonerate her husband's estate from all liability. But this question is not now considered, for the reason that all of the facts and circumstances connected with or concerning the two estates are not now before the court.

CARRIERS OF FREIGHT—LIMITING LIABILITY.—The case of Pacific Express Co. v. Foley, 26 Pac. Rep. 665, decided by the Supreme Court of Kansas, is interesting and instructive upon the question of limitation of liability by common carriers. The court hold that where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing for over $50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between

the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common or ordinary negligence on the part of the carrier, its agents or servants. The case of Kallman v. Express Co., 3 Kan. 205, referred to and commented on. Railroad Co. v. Simpson, 30 Kan. 645; 2 Pac. Rep. 821, distinguished, as the carrier in that case arbitrarily and unfairly mixed in the bill of lading or receipt a limitation on the value of the property shipped. Upon the main question Horton, C. J., says:

It is settled by the decisions of this court, and by the great weight of authority, that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants, on grounds of public policy, even by express contract. Railroad Co. v. Simpson, 30 Kan. 645, 2 Pac. Rep. 821; Railroad Co. v. Lockwood, 17 Wall. 357, and the cases therein cited; 2 Amer. & Eng. Enc. Law, 822. But this is not the question presented by the record in this case. The receipt executed by the express company, and knowingly and voluntarily accepted by the shipper through his agent, expressly provided "that the express company was not to be liable for any loss or damage to the box, for over fifty dollars, if the just and true value thereof was not stated." The true and just value of the box was not stated in the receipt or to the company by the shipper. The trial court very properly instructed the jury "that the shipper must be presumed to have assented to the terms and conditions of the receipt." Two questions are therefore presented for our determination: *First*. May a common carrier limit his liability to an amount stated in a written receipt or special contract, in the event of loss or injury to the goods or property through ordinary negligence, if such special contract is freely, voluntarily and fairly entered into by the parties, and such contract is just and reasonable in its terms? *Second*. Did the written receipt or special contract between the shipper and express company in this case limit the liability of the company for loss or injury to the amount of fifty dollars?

The better authorities declare the law to be that the value of the property transported may be agreed upon, and the damage or loss to the property occasioned by the negligence of the company or its servants will be limited to the agreed valuation. The Hart Case, 112 U. S. 331, 5 Sup. Ct. Rep. 151, may now be called the leading case in America. Mr. Justice Blatchford, delivering the opinion of the court in that case, said, among other things, that "it is the law of this court that a common carrier may, by special contract, limit his common-law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. * * * There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. * * * The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based upon that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." See, also, Harvey v. Railroad Co., 74 Mo. 539; Brehme v. Dinsmore, 25 Md. 329; Railroad Co. v. Sherrod, 84 Ala. 178, 4 South. Rep. 29; Duntley v. Railroad (N. H., 1890), 20 Atl. Rep. 327; Magnin v. Dinsmore, 62 N. Y. 35; Squire v. Railroad Co., 98 Mass. 239-245; Graves v. Railroad Co., 137 Mass. 33; Hill v. Railroad Co., 144 Mass. 284, 10 N. E. Rep. 836; Falkenau v. Fargo, 35 N. Y. Super. Ct. 332, 55 N. Y. 642; Ghormley v. Dinsmore, 53 N. Y. Super. Ct. 36; Westcott v. Fargo, 6 Lans. 328; Grace v. Adams, 100 Mass. 505; Pemberton Co. v. New York Cent. R. Co., 104 Mass. 144. See also Breese v. Telegraph Co., 48 N. Y. 132, 139, 141, 142; Railroad Co. v. Payne (Va., 1890), 10 S. E. Rep. 749.

Valentine, J., dissents from the conclusion of the court in a vigorous opinion, from which we extract the following:

I think we should follow the decision made in the case of Kallman v. Express Co., 3 Kan. 205—*First*, because it is right; and, *second*, for the following reasons: It was made on February 17, 1865, more than 26 years ago; the courts have been open ever since, and 20 or more sessions of the legislature have intervened, and yet no modification of any of the rules therein enunciated have been made, but all seem to have been acquiesced in; and for these reasons it must be presumed that the parties to this action, and especially the express company, contracted with reference to such rules; and now, to overturn them, and to declare different rules for this case, would virtually be to make a new contract for the parties; and construing the present contract as the contract in that case was construed would render the contract valid, while to construe it as the express company now desires to have it construed would render it void. To construe the contract so as to limit the express company's common-law liability only as an insurer, and only for losses and injuries brought about by other causes than the company's own negligence, fraud or willful wrongs, would render the contract valid; while if it be construed in such a manner as to reach to the domain of negligence, fraud and willful wrongs on the part of the express company itself, and to limit the company's liability so that the company would not be liable for losses occasioned by its own negligence, fraud or willful wrongs, would render the contract to that extent invalid and worthless. It must be remembered that in this case the value of the property transported was not agreed upon. Whether it was worth one cent, one dollar, one hundred dollars, one thousand dollars, or any other sum, greater or less, is left wholly blank. There seems to have been no

thought of fixing, by contract or otherwise, the actual value of the property, or any value, but it was actually worth $144.55. In this failure to fix the value of the property by contract, this case differs essentially from the case of Hart v. Railroad Co., 112 U. S. 332, 5 Sup. Ct. Rep. 151. There are other distinctions between the present case and those relied on by the express company. For instance, the shippers themselves, in some of the cases relied on by the express company, were guilty of fraud or unfair dealing, as in the case of Oppenheimer v. Express Co., 69 Ill. 62, 68. In that case the shippers delivered to the express company for transportation a certain box containing watches and jewelry of the value of $3,800, without disclosing its contents or their great value, and paid only $1.40 for its transportation; while, if they had disclosed its contents and their value, they would have had to pay $10.90 for its transportation. The receipt which they took from the express company did not state the contents or the value of the goods, but stated, "Contents unknown." The court, in commenting upon these matters, used the following, among other language: "There was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in the cases of—[here certain cases are given.] Had the true value of the goods been disclosed, there would have been an extra charge of $9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved." In this case of Oppenheimer v. Express Co., no pretense of fault or negligence on the part of the express company was imputed, but, on the contrary, it was admitted by the parties that the company was not guilty of any fault or negligence; and in the latter case of Railroad Co. v. Chapman, 24 N. E. Rep. 417, 419 (decided by the Supreme Court of Illinois on May 14, 1890), it is stated as follows: "In Oppenheimer v. Express Co., 69 Ill. 62, the court held that the contract exempting carriers from liabilities is not to be construed as providing against loss or injury occasioned by actual negligence on their part." Indeed, the case of Oppenheimer v. Express Co., has no application to this present case. In the present case the shipper was not guilty of fraud or unfair dealing, and the express company was unquestionably guilty of culpable negligence. In the case of Bank v. Brown, 9 Wend. 85, 114 *et seq*, an intended passenger on a steamboat, without paying extra fare, took with him on the steamboat as baggage an ordinary traveling trunk containing $11,250. In a few minutes afterwards the trunk and its contents were removed, and the owner never recovered them. The owners of the steamboat had no knowledge of the contents of the trunk nor of their great value, and it was held they were not liable for their loss. Other distinctions might be shown between this case and the cases relied on by the express company if it were thought necessary. The stipulation contained in the receipt given by the express company in the present case, limiting its liability for loss or damage, does not limit its liability, except with respect to an amount in excess of $50. Up to that amount the express company's liability remains precisely the same as it would be at common law, or as it would be if no contract limiting its liability had ever been made. But for the excess above $50 the express company claims that it has obtained a boundless immunity from liability; that it has not only obtained an absolute exemption from all liability for all loss or damage above that amount, where the loss or damage has occurred without fault or negligence on its part, but that it has also obtained such an exemption where the loss or damage has been occasioned by its own negligence, or by its own fraud or willful wrongs, including the willful destruction of the property, or the greater wrong of feloniously stealing it. This cannot be correct. The stipulation in such receipt ought to be so construed as to exempt the company from liability for only such loss or damage in excess of $50 as might be occasioned by the fault or negligence of others, or as might result from some accident, casualty or misfortune over which the company could have no control. I think the weight of authority sustains this view. While a common carrier may make a valid contract exempting himself from his common law liability as an insurer and for losses occasioned by the acts of others without his fault, or occasioned by such of his own acts only as do not involve any kind of wrong, or occasioned by circumstances over which he has no control, yet he cannot make a valid contract exempting himself from liability for losses occasioned by his own carelessness or negligence or improper acts. Such a contract would be against public policy, and void. I think the contract in the present case should be construed precisely as though it did not attempt to limit the express company's liability at all for losses occasioned by its own negligence or improper conduct, and I would refer to the following authorities in support of this view: Kallman v. Express Co., 3 Kan. 205; Railroad Co. v. Simpson, 30 Kan. 645, 2 Pac. Rep. 821; Railway Co. v. Peavey, 29 Kan. 169; Telegraph v. Crall, 38 Kan. 679, 17 Pac. Rep. 309; Farnham v. Railroad Co., 55 Pa. St. 53; Express Co. v. Sands, *Id.* 140; Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. Rep. 134; Weiler v. Railroad Co., 134 Pa. St. 310, 19 Atl. Rep. 702; Express Co. v. Moon, 39 Miss. 822; Railroad Co. v. Abels, 60 Miss. 1017; Express Co. v. Seide, 67 Miss. 609, 7 South. Rep 547; Kirby v. Express Co., 2 Mo. App. 370; McFadden v. Railway Co., 92 Mo. 343, 4 S. W. Rep. 689; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. Rep. 497; The City of Norwich, 4 Ben. 271; Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469; Rosenfeld v. Railway Co., 103 Ind. 124, 2 N. E. Rep. 344; Express Co. v. Harris, 120 Ind. 73, 21 N. E. Rep. 340; Railway Co. v. Harris, 67 Tex. 166, 2 S. W. Rep. 574; Railway Co. v. Maddox, 75 Tex. 300, 12 S. W. Rep. 815; Erie Dispatch v. Johnson, 87 Tenn. 490, 11 S. W. Rep. 441; Railroad Co. v. Wynn, 88 Tenn. 320, 14 S. W. Rep. 311; Railroad Co. v. Gilbert, 88 Tenn. 430, 12 S. W. Rep. 1018; Black v. Transportation Co., 55 Wis. 319, 13 N. W. Rep. 244; Railroad Co. v. Hopkins, 41 Ala. 486; Express Co. v. Stettaners, 61 Ill. 184; Railway Co. v. Chapman, 24 N. E. Rep. 417, 419 (Ill., May 14, 1890); Judson v. Railroad Corp., 6 Allen, 486; Orndorff v. Express Co., 3 Bush, 194; Express Co. v. Backman, 28 Ohio St. 144; Lamb v. Railroad Co., 46 N. Y. 271.

In my opinion, notwithstanding the stipulation in the aforesaid receipt, limiting, to some extent, the liability of the express company, the company was still bound, at its peril, to act in good faith, as towards its employer, and to exercise reasonable care and diligence with respect to its employer's goods. There was ample evidence to show negligence on the part of the express company, if not gross negligence. The goods were shipped from Kansas City in good order.

When they arrived at their destination, at Lawrence, the box containing them was found broken. With due care, however, they might still have been saved, as is fairly inferable from the evidence, and as was the opinion of the jury according to their findings. The box, however, was turned over by one of the express company's agents, and a piece came out. Afterwards the company's agent attempted to take the box and contents from the express car in which they were transported, and to put the same on a truck, and in doing so some of the type and some of the electrotype plates fell down between the car and the platform. Afterwards they gathered them up, and put them into a coal scuttle, and took them to a house belonging to the express company, where they remained for some time, and were afterwards removed to the express company's office, where they still remain, so far as is known. This seems like gross negligence. It was not necessary, however, that gross negligence should have been shown. Ordinary negligence only, or, in other words, a want of ordinary care, was all that was necessary. In the case of Kallman v. Express Co., *supra*, the following, among other language, with reference to express companies limiting their common law liabilities, is used: "An examination of the authorities bearing upon this point will, we think, show that they may do so, provided, however, that due care and diligence be used in the discharge of their trust. But carriers cannot in this way shield themselves from the consequences of fraud, gross negligence and want of care. * * * It is only when such carriers act in good faith, and use due care and diligence in and about their business, that the law permits them to have the benefit of limitations like that under consideration."

INSURANCE—CONDITIONS—WARRANTY—EMPLOYMENT OF WATCHMAN.—In Rankin v. Amazon Insurance Co., decided by the Supreme Court of California, the policy contained a provision that "it is understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured, to be in and about the premises day and night." Construing this requirement, the court said:

The court instructed the jury that "if the assured employed a watchman to be in and about the premises day and night while the mill was idle, then the plaintiff is entitled to recover," and submitted to them for determination the question whether plaintiffs had performed the conditions of the contract. Cases are cited by respondent in support of the action of the court, which hold that under certain watchmen clauses it is proper to receive evidence of usage, and to submit to the jury the question whether the insured employed a watchman to look after the property in the manner in which men of ordinary care in similar departments of business manage their own affairs of like kind. But they all go off upon the proposition that the terms of the warranty are not explicit as to the time and manner of keeping a watch. Thus in the Massachusetts case (Crocker v. Insurance Co., 8 Cush. 79, the language of the clause was, "a watchman kept on the premises;" and in the Illinois case (Insurance Co. v. Shipman, 77 Ill. 189), a "watchman to be on the premises constantly during the time until September 1, 1872." In the latter case plaintiff had employed a day watchman and a night watchman, and the only question considered was whether it was necessary for the watchman to be actually on the premises on which the insured buildings were situated. In the case before us the terms of the warranty are explicit as to the time of keeping a watch, and, on the undisputed evidence, we think the court ought to have held that the plaintiffs had not complied therewith. The mill was idle for two months prior to the destruction thereof by fire, and the evidence shows that plaintiffs did not employ a watchman "to be in and about the premises day and night." A watchman was employed but he was not instructed to watch the premises at night, and as a matter of fact, slept every night in a building distant three hundred or four hundred feet from the mill. Mr. Minear, the superintendent, testified that McMurray, the watchman, was not instructed to watch the premises during the night; that his instructions were not special, "either at day or night." In the nature of things, it could not be expected that one man could watch the buildings day and night (only one watchman was employed), but if it be assumed that he could, no one was employed to do so. There is no ambiguity in the phrase "day and night." "We do not need a dictionary, nor a law-book, nor the testimony of an expert, to tell us that a man who is employed to watch in the day-time, and who is permitted to sleep at night, is not a watchman at night." Brooks v. Insurance Co., 11 Mo. App. 349; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 39. It is not a case of mere negligence. If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but to entitle the insured to recover it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty. Trojan Min. Co. v. Fireman's Ins. Co., 67 Cal. 27; Wenzel v. Insurance Co. *Id.* 438; Cowan v. Insurance Co., 78 *Id.* 181; Waters v. Insurance Co., 11 Pet. 219. It does not appear whether the watchman was actually on duty at the time the fire occurred. If the fact be considered as material, it is sufficient to say, that defendant having shown the mill was idle, the burden of proving a compliance with the warranty rested upon the plaintiffs. Cowan v. Insurance Co., *supra;* Wood Ins. (2d ed.), 1136.

GARNISHMENT—COUNTIES—DEBT OF OFFICER.—The case of Waterbury v. Board, 26 Pac. Rep. 1002, decided by the Supreme Court of Montana, holding that counties are subject to garnishment for debts owed by it to one of its officers is opposed to prevailing authority. The court reach this conclusion upon a consideration of the terms of the statute, and believe such a construction of its provisions is not contrary to public policy, as tending to impede the exercise of its functions, and to impair the usefulness of its servants. De Witt, J., says:

The garnishment of towns, cities and counties has been the subject of such conflicting views in different States, and being a first impression in this court, we incline to adopt the language of Judge Welch in City of Newark v. Funk, 15 Ohio St. 463: "In other States authorities are quite conflicting; so much so, that we

do not feel bound by any of them, and see nothing to prevent us from deciding the question as an original one, according to our own views of public policy and the meaning and intent of the statute." This conflict to some extent, but by no means wholly, dissolves, upon an inspection of the statutes upon which the decisions are made. In 2 Wade Attachm. §§ 345, 419, are marshaled the States holding diverse views, and the author concludes that the majority is against holding municipal corporations as garnishees. But the author doubts the soundness, and questions the reason of the rule. There is eminently respectable opinion upon the other side of the question. An analysis of the case would be interesting, but we will not enter upon it, by reason of the direct conflict of the decisions, even upon similar statutes; and, furthermore, we are of opinion that the statutes of this State are so much more explicit upon the subject under consideration, that many of the decisions of sister States are inapplicable, and that, in view of our statute, the weight of authority is not against the liability of a county as a garnishee. It is not doubted that the statute may exempt a county from the process of garnishment. Our statute does not so exempt a county; and, if they are to be exempted, the authority must be found elsewhere than in the express declaration of the statute. Again, the statute may subject the county to this process. Now, what do we find in the written law? It declares that "all persons" having in their possession or under their control any credits or other personal property belonging to the defendant, or owing debts to him, etc., shall be liable to the process. Furthermore, that the word "person" may be applied to "bodies politic and corporate." Hence counties, as "bodies politic and corporate," are brought within the meaning of the word "persons," and all persons may be garnished. It is therefore no strained conclusion to say that a county is subject to the process. Speaking of holding a county as garnishee, Judge Biddle (Wallace v. Lawyer, 54 Ind. 506) says: "And the decisions are generally made upon statutes authorizing corporations, in terms, to be garnished; yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations, or bodies politic and corporate. The words used in the statute of this State are 'persons' or 'corporations,' in general terms." But the statute of Montana, as above noticed, goes further than to use the words "persons" or "corporation" in general terms, as in Indiana, and the remarks of the judge in that case, and the authorities to which he refers, lose their force in this court. It is a general principle that one who may be sued may be garnished by the creditor of the person who may sue. Counties, with us, may be sued (section 744, Gen. Laws), and, therefore, under the general rule, they would be subject to garnishment. They, in this respect, do not come within the reason of exempting a sovereign State from garnishment, which sovereignty may not be sued, or ordinarily subjected to process of the courts. It being clear that the statute does not expressly exempt counties from garnishment, and it being equally clear that the letter of the statute is such that it can be reasonably applied to a county as a subject of garnishment, is there anything in the spirit of the law or the doctrine of public policy which prohibits such a construction?

We will examine, in the light of the statute, the reasons adduced for exempting counties from this rocess of the courts. It is objected that there is ractical difficulty in summoning an artificial entity, like a county, to be examined on oath respecting its possession of property of the debtor, as provided in section 190, Code Civil Proc., and that so summoning its officers is a serious interruption to the business of the county and its officers. We cannot agree with this view. The statute (section 749 Gen. Laws) expressly provided a method for service of process against a county in all legal proceedings. In another portion of the statute (section 72) service of a summons upon a county is provided for. Answering a garnishment is by no means as large an affair as appearing in an action as a defendant. The statute providing a method for summoning a county in legal proceedings, we can see no particular difficulty in its appearing. There was certainly none in this case, and no derangement of the county's business. Again, it is said that the writ does not lie against a county by reason of its being contrary to public policy; that disasters to the public would ensue if the writ were allowed, and public servants would be impaired in their usefulness. In Wallace v. Lawyer, *supra*, it was held that a county cannot be held to answer as to its indebtedness to an execution debtor for his salary as an officer of such county in proceedings supplemental to execution. This case cites with approval Merwin v. City of Chicago, 45 Ill. 133, which was a case of garnishment of a municipal corporation, in which the court, by Lawrence, J., says: "The only question presented by this record is whether municipal corporations in this State are liable to the process of garnishment. This court held in City of Chicago v. Hasley, 25 Ill. 595, that the property of such a corporation could not be levied on and sold under execution. This decision was placed upon the grounds of public policy. However strong the obligation of a town or city to pay its debts, it was considered that to allow payment to be enforced by execution would so far impair the usefulness and power of the corporation in the discharge of its government functions that the public good required the denial of such a right. * * * Although this decision is not conclusive upon the question before us as *res adjudicata*, yet the entire spirit and reasoning upon which it is based must lead us to a hold that a municipal corporation is not liable to the process of garnishment. The question has been often before the American courts, and, although the decisions are not uniform, in a large majority of the cases it has been held that the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Ill.: 'It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings, who are more dependent on the municipal, for the security of life and property, than they are on either the State or federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation.'" Thus it is observed that 45 Ill. 133, on the subject of garnishment of a municipal corporation, adopts the reasoning of 25 Ill. 595, in the matter of an execution against the corporation, on a judgment obtained directly against the corporation. The grounds for denying an execution against a corporation are most satisfactorily put in 25 Ill., City of Chicago v. Hasley. The court well points out the disasters which might follow the levy of execution against the city of Chicago; how the seizure of the water-works would precipitate a water famine,

the levy upon fire-engines would expose to the horrors of conflagration, and the seizure of revenues would paralyze government. To these views we have no dissent. But we cannot follow the Illinois court in 45 Ill. when it applies thes earguments to the matter of garnishment of the municipal corporation. By garnishment the water-works, fire-engines, public buildings and revenues of the corporation are not seized. The corporation is simply required to hold, and finally pay over, a sum of money or property, in which it has no interest, to one person rather than another. Its business is not interrupted; its property is not touched; its functions are not deranged.

AGREEMENT TO ARBITRATE, AS CONDITIONS PRECEDENT TO MAINTAINING SUIT.

Agreements to submit to arbitration questions and differences which are expected to arise, are frequently found in policies of insurance, building contracts, indentures of lease, and other instruments; and the construction and effect of such agreements often puzzle counsel, and embarrass the courts.

It is an established principle that if an agreement to refer a matter to arbitration is so drawn as to entirely prohibit the courts from acting thereon, and to oust the courts of their jurisdiction over the whole subject matter, and substitute in their stead the judgment or decision of a board of arbitrators, as a finality, that such an agreement is void, and does not deprive either party of the right to bring or maintain a suit or action.[1] If an agreement be made that "all disputes" between the parties in reference to the matter of agreement shall be referred to arbitration, that is the case with reference to which the courts have used the expression, that their "jurisdiction is ousted by agreement of the parties,"[2] and that such agreements are void. So if a tenant agree with his landlord that "if any dispute arise it shall be referred to arbitration."[3] And where the defendant covenanted with the plaintiff to keep so much ground game only as would do no injury to the landlords, and in case he should keep such a number as to do injury, to pay a fair and reasonable compensation the amount of which is to be referred to arbitration, it is held that a suit may nevertheless be maintained without first submitting to arbitration as agreed.[4] In the case of Reed v. Washington Fire and Marine Insurance Company,[5] the Supreme Court of Massachusetts held, that under the provisions in a policy of fire insurance that if any difference of opinion shall arise as to the amount of the loss it is mutually agreed that the loss shall be referred to arbitrators, "whose decision shall be final;" that arbitration under such an agreement was not a condition precedent to the right of the assured to bring an action upon the policy, the court said: "The reason generally given is, that such an agrement affects the remedy, and would, if enforced, oust the courts of their jurisdiction. Another reason is, that a submission to arbitration is a power, and revocable at any time before it is fully executed by an award made. A party will not be compelled to enter into a submission which he can forthwith revoke, and the bringing of an action amounts to a revocation." In Rowe v. Williams[6] a similar stipulation in a lease was held not to bar an action. In a case[7] where the plaintiff gave the defendant a license to manufacture machines under a patent right, the defendant paying a royalty, with a proviso that if the defendant failed to perform any of his agreements, the plaintiff might terminate the contract by giving thirty days' notice, and in case of a difference of opinion as to whether there had been such a failure on the part of the defendant as to warrant the giving of such notice, it was agreed to submit that question to arbitrators and abide the result of their decision—the court held that suit might nevertheless be maintained, and that the effect of the agreement was to entirely oust the courts of their jurisdiction, and that such agreements would not be supported at law or in equity.

While these and similar agreements[8] have been held void, as ousting the courts of their right to hear and determine all causes, there has sprung up since the case of Scott v. Avery,[9] a distinction, first drawn in that case, that it is not unlawful for parties to agree to arbi-

[1] Kill v. Hollister, 1 Wils. 129; Thompson v. Charnock, 8 T. R. 139; Tattersall v. Grote, 1 Bos. & P. 131; Goldstine v. Osborne, 2 Car. & P. 550; Robinson v. George's Ins. Co., 17 Me. 131; Gray v. Wilson, 4 Watts, 39.

[2] Horton v. Sayre, 4 Hurl. & N. 642.

[3] Tredman v. Holman, 10 W. R. 652, 1 H. & C. 72.

[4] Dawson v. Fitzgerald, 24 W. R. 773; s. c., 3 Cent. L. J. 477.

[5] 24 Lathrop, 572 (138 Mass.).

[6] 97 Mass. 163.

[7] Wood v. Humphrey, 114 Mass. 185.

[8] Noyes v. Marsh, 123 Mass. 286; Vass v. Walker, 129 Mass. 38; Evans v. Clapp, 123 Mass. 165; White v. Middlesex R. R. 135 Mass. 216.

[9] 8 Excheq. 487, 5 H. L. Cas. 811.

tration as a condition precedent to suit, with respect to the mode of settling the amount of damages or the time of paying it, or any matters of that kind that do not go to the root of action, and that if an agreement did not deprive the plaintiff absolutely of his right to sue, but only rendered it a condition precedent, that the amount to be recovered should first be ascertained by a committee of arbitrators, that such an agreement did not oust the courts of their jurisdiction, and that where a covenant or agreement created a condition precedent of this kind, that the courts cannot be resorted to until the condition precedent was fulfilled.[10] In Horton v. Sayer, Bramwell, B., says: "The principle of the decision in Scott v. Avery is very intelligible, if a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, that is, the case with reference to which the courts have used the unfortunate expression that 'their jurisdiction is ousted by the agreement of the parties.' On the other hand, if a man covenants to do a particular act, and that in the event of his doing it, the other party shall be entitled to receive such a sum of money as they shall agree upon, or if they cannot agree, such an amount as shall be determined by an arbitrator,—there is no debt which can be sued for until the arbitrator has ascertained what sum is to be paid." The ruling in Scott v. Avery has been followed in England in many cases.[11] In Dawson v. Fitzgerald,[12] Lord Coleridge, C. J., said: "I find the exact effect of Scott v. Avery stated in better language than I could use in the judgment of Mr. Baron Bramwell in Elliott v. The Royal Exchange Assurance Company,[13] where he says: "In the argument of the case of Scott v. Avery, Mr. Manisty and myself were counsel for defendants, we scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below and the House of Lords. That proposition was, that if two persons, whether in the same or a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then the cause of action does not arise until the third person has so assessed them." In the same case Pollock, Baron, states the rule to be, that "if a tenant covenants that he will cultivate the demised land in husband-like manner, and also covenants that if any dispute arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained, but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them."

In Hood v. Hartshorne,[14] it was stipulated in a lease of land, that at the end of the term buildings erected on the land by the lessee should be appraised by three disinterested men, one to be chosen by the lessee, one by the lessor, and the third by the two others, and that the lessor should purchase said buildings at the price so set by said appraisers,—the court held that this agreement give the lessor certain rights which were preliminary to the rights of the lessee to maintain an action for the price of the buildings, and that it bound the lessee to do all that was reasonable in his power to procure the stipulated appraisement before bringing suit, and that if he had failed to do so, he was not entitled to maintain the action, but must proceed according to his contract. This case was distinguished from the case of McCarren v. McNulty,[15] where the decision of the arbitrator was final, without regard to the validity of the reasons he might give for it, and from Phippen v. Stickney,[16] in which the referees were named, and when the individuals named, failed to make an appraisement, the stipulated method of ascertaining the value wholly failed, there being no obligation resting on either party to appoint other appraisers. It is to be remarked that the case of Hood v. Hartshorne,[17] instead of evincing the jealousy shown in old cases of arbitrators, and the disposition not to allow the jurisdiction of the

[10] 4 Hurl. & N. 649.
[11] Elliott v. Royal Exch. Assur. Co., L. R. 2 Ex. 237; Braunstein v. Accidental Death Ins. Co., 1 B. & S. 782; Scott v. Liverpool, 3 DeG. & J. 334; Tredman v. Holman, 1 H. & C. 72.
[12] 24 W. R. 773, 3 Cent. L. J. 477.
[13] 15 W. R. 908, L. R. 2 Ex. 242.
[14] 100 Mass. 117.
[15] 7 Gray, 139.
[16] 3 Metc. 384.
[17] 100 Mass. 117.

courts to be ousted by agreements to arbitrate, indicates a change in judicial policy, Chapman, Justice, says: "There is no policy of the law of this commonwealth adverse to the settlement of controversies or questions between parties by arbitration; and contracts to that effect are enforced, so far as they can be consistently with the principles of law. Judicial tribunals are provided by the government to enable parties to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection." This is on line with the remark of Pollock, Baron, in Dawson v. Fitzgerald,[18] that "it has been shown, not only by decisions, but by the legislation of late years, that the same pious reverence is not felt for litigation in open court that was felt in old times."

In Perkins v. U. S. Electric Light Company,[19] decided in U. S. Circuit Court for the Southern District of New York in April, 1883, the court held that where a contract stipulates that an arbitration is to be a condition precedent to the right to sue upon the contract, or if this may be fairly inferred upon construction of the whole contract no suit can be maintained unless the plaintiff has made all reasonable effort to comply with this as a condition precedent. Low v. Fisher [20] holds that there may exist by contract a condition precedent to the right to sue by an ascertainment of the amount due by a certain party, or to be established by certain stipulated evidence, and the Supreme Court of the United States has committed itself to the same doctrine.[21] In the case last cited, a steamboat was chartered for the conveyance of a detachment of troops, and it was agreed in the charter party, that if a larger quantity of stores and baggage should be conveyed than was agreed, that freight should be paid for the same on the production of the certificate of the commanding officer, and the court held, that this certificate was alone admissible to establish the amount of the freight, and that payment could not be compelled unless the plaintiff should first procure the same, or show that by time or accident he was unable to do so. The case of Crossley v. Connecticut Fire Insurance Company,[22] is apparently in conflict with the view that such agreements are conditions precedent, but that case seems to have turned upon the wording of the agreement, and it may be reconciled with the other cases on the subject. To those desiring to pursue the subject the cases cited below [23] may be instructive and interesting.

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[18] 24 Weekly Rep. 773, 3 Cent. L. J. 477.
[19] 15 Reporter, 680, 17 Cent. L. J. 137.
[20] 27 Fed. Rep. 542.
[21] U. S. v. Robeson, 9 Pet. 319.
[22] 27 Fed. Rep. 30.

[23] Cray v. Hartford F. Ins. Co., 3 Blatchf. 280; Crisp v. Bunbury, 8 Bing. 394; The Queen v. Norwich Savings Bank, 1 P. & Dav. 477, 9 Ad. & El. 729; Rex v. Mildenhall Savings Bank, 2 Nev. & P. 278, 6 Ad. & El. 952; Eastern Union Railway Co. v. Eastern Counties Railway, 2 El. & Bl. 530; Stacy v. Bank of England, 6 Bing. 754; Milner v. Field, 5 Exch. 829; Chambers v. Jenness, 4 Barr. 39; Livingstone v. Rolli, 5 El. & Bl. 132; Russell v. Pellegrini, 6 El. & Bl. 1020; Fenlon v. Monongahela Nav. Co., 4 Watts & S. 205; Faunce v. Burke, 16 Pa. St. 469; Snodgrass v. Gavit, 28 Pa. St. 221; Lanman v. Young, 31 Pa. St. 309; Delaware & H. Canal Co. v. Penn. Coal Co., 50 N. Y. 250; Old Saucelito Land Co. v. Commercial Union Assur. Co., 66 Calif. 253; Flaherty v. Germania Ins. Co., 1 W. N. C. (Pa.) 352; Coffee v. Southwork Ben. Assn., 2 W. N. C. (Pa.) 600; Ganche v. Lond & L. Ins. Co., 4 Woods, 102, 10 Fed. Rep. 347; Carrol v. Girard Fire Ins, Co., 13 Pac. Rep. 863; Adams v. South British, etc. Co., 11 Pac. Rep. 627; Calvin v. Provincial F. Ins. Co., 27 Upper Canada Q. B. 403; Davenport v. Long Island Ins. Co., 10 Daly, 535.

LOTTERIES—GIFT ENTERPRISES—RESTRAINT OF TRADE.

LONG V. STATE.

Court of Appeals of Maryland, June 18, 1891.

Code Pub. Gen. Laws Md. art. 27, § 185, provides that no person shall be permitted, either directly or indirectly, to sell or offer for sale any wares, goods or merchandise of any description, holding out as an inducement for such sale "any scheme or device by way of gift enterprises of any kind or character whatsoever." *Held* that, in so far as this statute prohibits "gift enterprises" into which no element of chance enters, it is an unreasonable restriction upon trade, and is invalid.

FOWLER, J. The plaintiff in error, Calvin Long, was indicted in the criminal court of Baltimore city for violating the acts of assembly of 1886, ch. 480, which has been codified as section 185, art. 27, of the Code of Pub. Gen. Laws, and which reads as follows: "No person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, trade, or to offer for barter, sale or trade, by any publication, or in any way, any wares, goods, or merchandise of any description, in package or bulk, holding out as an inducement for any such barter, sale or trade, or the offer of the same, any scheme or device by way of gift enterprises of any kind or character whatsoever." The indictment contained two counts—the first charging that the said Long unlawfully sold certain merchandise,

holding out as an inducement for such sale a certain scheme and devise by way of gift enterprise; and the second, that he kept a certain place or house for the purpose of selling lottery tickets. At the trial the State abandoned the second count, relating to the sale of lottery tickets, and elected to stand upon the first count. The plaintiff in error then demurred to the indictment upon the ground that the act of assembly of 1886, ch. 480, codified as above mentioned, upon which the first count is based, is void. This demurrer was overruled, and, having been duly tried and convicted, said Long appealed to this court from the rulings of the criminal court as to the admissibility of certain testimony. Long v. State, 21 Atl. Rep. 683, (January term, 1891, not yet officially reported). We approved the rulings of the lower court, and remanded the case for further proceedings. A final judgment having been entered, a writ of error was sued out, assigning a number of errors. All of them, however, present the same question, namely, whether the act referred to is a valid exercise of legislative power. This is the only question here presented. It was not before us on the former appeal, for we then assumed that the act was valid. The legislation we are considering is one of a class of laws of which have been enacted in almost all the States, in order if possible, to prevent lotteries and gambling from entering into the ordinary transactions of life. We find many cases, some of them being referred to by the attorney general in his brief, illustrating the necessity of such laws to restrain the introduction into mercantile transactions of lottery schemes and gambling devices like the one the plaintiff in error used in his business. We said on the former appeal that such a device had not even the merit of originality, and it undoubtedly violates the provisions of our Code prohibiting lotteries, "and all devices and contrivances designed to evade" the said provisions. The ingenuity and fertility of invention which has been exercised in efforts to evade such laws would no doubt win success in legitimate lines of business. It would unduly prolong this opinion to review the many cases referred to upon the briefs. All of those relied upon by the State are cases in which there was an indictment under the laws prohibiting lotteries, and in which it was held the several devices or contrivances adopted involved chance. The case of People v. Gillson, 109 N. Y. 389, 17 N. E. Rep. 343, is the one chiefly relied upon by the plaintiff in error. We will consider it presently. In Hull v. Ruggles, 56 N. Y. 424, the exigency of the case required the court to determine and define what is a lottery, and they laid down this definition: "Where a pecuniary consideration is paid, and it is determined by lot or chance according to some scheme held out to the public what and how much he who pays the money is to have for it, that is a lottery." Worcester's definition is: "A game of hazard, in which small sums are ventured for the chance of obtaining greater value." And the definition adopted by the State in this case is not materially different from the above: "Any scheme for the distribution of prizes by lot, or which one on paying money to another obtains a token, which entitles him to receive a larger value or nothing, as some formula of chance may determine, is a lottery." In one respect we think all of these definitions are too narrow to cover some of the modern devices resorted to in order to evade the lottery laws, and that, whether the consideration paid or given for the token, or chance to win something generally called a "prize," consists of money or any other thing of value makes no difference. An examination of the many cases on this subject will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery or gaming laws in force in the various States of the Union. In the case of Yellow Stone Kit v. State, 88 Ala. 196, 7 South. Rep. 338 (1888), the court uses this language: "If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law, if it be entirely unsupported by any valuable consideration moving from the taker, there is nothing in this mode of conferring it violative of the policy of our statutes condemning lotteries or gaming." It is apparent, however, that the giving away of property without consideration, whether by lot or otherwise, is not in itself an evil, and certainly not such an evil as requires prohibition by law at the present day. The case referred to—that of People v. Gillson, decided by the court of appeals of New York in 1888—arose upon the question of the validity of an act of the legislature of that State, which provided that "no person shall sell, exchange, or dispose of any article of food, or offer or attempt to do so, upon any representation, advertisement, notice, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received as a gift, prize, premium or reward to the purchaser." It was held that "by the provisions of this act a man owning articles of food which he wishes to sell or dispose of, is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful pursuit and in a manner not injurious to the community, is certainly infringed, limited, perhaps weakened or destroyed, by such legislation." "The law," says the New York court, "interferes with the free sale of food, for the condition is imposed that one shall sell food, and at the same time, and as part of the transaction, give away any other thing." These remarks apply with great force to our own act, which prohibits, as we have seen in connection with any sale of goods, wares, or merchandise, "any scheme or device by way of gift enterprises of any kind or character whatsoever." This broad and sweeping language would seem to include not only a lottery in which a valuable consideration is given

for the chance to win a prize, but also a gratuitous distribution not involving the element of chance. The words "gift enterprise," so far as we have ascertained, have never been judicially defined. The Century Dictionary gives the only definition of the words we have been able to discover, as follows: "A business, as the selling of books or work of art, the publication of a newspaper, etc., in which presents are given to purchasers as an inducement." It was contended on the part of the State that the act of 1886 comes within the legimate excercise of the police power, and that "gift enterprise" is a species of lottery, because the distribution in all gift enterprises, is dependent on some formula of chance. But we do not think the words "gift enterprise" necessarily imply a scheme involving chance. In so far as the object of an act is to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling, it undoubtedly would be a valid exercise of power, and the citation of authorities is not necessary to sustain a proposition so well settled. But the act in question goes further, and in effect, as we construe it, declares, as did the New York statute, which was held invalid in the case referred to, that no person shall give away anything to a purchaser of goods, wares, or merchandise, as an inducement to make the purchase. Such a regulation of trade is, in our opinion, not only unwise, but unlawful, and unlawful because it is necessary neither for the benefit, safety, nor welfare of the people, and which in its operation would be oppressive and burdensome. People v. Gillson, 109 N. Y. 389, 17 N. E. Rep. 343; Jacob's Case, 98 N. Y. 98; Butchers' Union Slaughter-House Co. v. Cresent Live-stock Landing Co., 111 U. S. 745, 4 Sup. Ct. Rep. 652; Railroad Co. v. City of Jacksonville, 67 Ill. 40. It must always be conceded, of course, that the State, can, through its legislature, by the legitimate exercise of its police powers, pass "laws and regulations necessary for the protection of the health, morals, and safety of society." Singer v. State, 72 Md. 466, 19 Atl. Rep. 1044; yet such regulations must be reasonable, and "what are reasonable regulations, and what are subjects of the police power, must be necessarily judicial questions." Railroad Co. v. City of Jacksonville, 67 Ill. 40. It follows that the act of 1886, ch. 480, by reason of its general terms, including as it does all gift enterprises, those involving the element of chance, as well as those that do not, is involved, so far as it relates to gift enterprises, not involving chance, and that the judgment of the criminal court of Baltimore must be reversed. Judgment reversed, and cause remanded.

NOTE.—Not many years ago the weight of judicial authorities in this country was in support of the doctrine that the owners of lottery franchises, who had paid a valuable consideration therefor, and their assigns, were possessed of vested rights that could not be divested or abridged during the time of their stipulated existence, unless the right so to do was reserved in the act making the grant. The decisions were put upon the ground that such grants were contracts between the owners of the franchises and the States making them, coming under the article of the federal constitution prohibiting the States from enacting laws impairing the obligation of contracts. Trustees of Vincennes University v. Indiana, 14 How. (U. S.) 268; State Bank v. Hastings, 1 Doug. (Mich.) 225; Kellum v. State, 66 Ind. 588; The Binghampton Bridge, 3 Wall. 51; Edwards v. Jayers, 19 Ind. 407; Payne v. Baldwin, 3 S. & M. 661; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Broadhead v. Tuscaloosa, etc. Association, 45 Ala. 170. The courts of other States held that, even if the grant was only a license and not a contract, it could not be withdrawn until the pecuniary interests of the owner and the State had been fully adjusted. Covington & Lexington Railroad Company v. Kenton County Court, 12 B. Mon. 147: Gregory's Ex'rs v. Shelby College, 2 Met. (Ky.) 589. But the Supreme Court of Mississippi, taking that view of the grant in Moore v. State, 48 Miss. 147, held that such a franchise does not come within the purview of the constitutional provision, and therefore it may be abrogated unconditionally at the will of the law making power. It is well settled that neither the police power itself, nor the discretion to exercise it as need may require, can be bargained away by the State (Boyd v. Alabama, 94 U. S. 645; Beer Company v. Massachusetts, 97 U. S. 25); and as in recent years lotteries are generally considered to have a pernicious influence over the morals of the community, they are now looked upon as a proper subject of regulation by the State governments under their police power. It is therefore almost unanimously held that those who invest their money in the purchase of such benefits must do so at the risk of the franchise being annulled absolutely; that the right to suppress them is governmental, to be exercised at any time by those in power, at their discretion. Boyd v. Alabama, *supra*. Such schemes are looked upon as affecting the morals of the community, and public policy therefore forbids their operation. The Supreme Court of the United States announced these conclusions in Stone v. Mississippi, 101 U. S. 814, and held that as such grants are subject to the police power, the protection afforded by the provision of the federal constitution has no application. See also Phalen's Case, 1 Bob. (Va.) 713; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Patterson v. Kentucky, 97 U. S. 501; Boyd v. Alabama, *supra*. The Supreme Court of Indiana then reversed its decision in the Vincennes University Case, accepting the opinion of the federal tribunal as a settlement of the constitutional question. State v. Woodward, 89 Ind. 110. Now lotteries are everywhere prohibited by positive enactments of the States, except in Delaware, where the sale of tickets in State lotteries is still allowed, and in Louisiana, where the withdrawal of the privileges of the State lottery will not take effect till January 1, 1895. Many of the State constitutions provide that the legislatures shall not authorize lotteries, and also prohibit the sale of lottery tickets within the State. In other States the setting up, carrying on or promoting of any lottery, and the sale of tickets or shares in lottery schemes, to be drawn within the State or in a foreign State, is declared by statute to be a crime or misdemeanor punishable by appropriate penalties. Then the national government forbids by statute the employment of the United States mails for lottery purposes. United States Rev. Stat. 3894. But it is frequently difficult to decide whether a scheme attacked falls within these prohibitions as to the lottery

business. The word lottery has no definite signification. In Bell v. State, 1 Sneed (Tenn.), 507, it was defined to be a "sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks. A game of hazard in which small sums are ventured for the chance of obtaining greater." But the name has no technical meaning. It is applied to any process of determining prizes by lot, whether the object be amusement or gambling or public profit. "A lottery is nothing more nor less than a scheme or device of chance." People v. Noelke, 94 N. Y. 37; State v. Willis, 78 Mo. 70. It is a scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity or design cannot enable him to know or determine until the same has been accomplished. The character of the scheme as a lottery is not affected by the fact that when the ticket was bought the plan for the drawing had not been determined. Thomas v. People, 59 Ill. 160; Trout v. State, 111 Ind. 499. "It is a game in which a price is paid for the chance of a prize." Commonwealth v. Sullivan, 146 Mass. 142. "Any device whatsoever by which money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, is a lottery." Smith v. State, 68 Md. 168. Many ingenuous devices have been resorted to in efforts to evade the laws for the suppression of the lottery business. Whether a certain game falls within the constitutional or statutory prohibition is a question of law. But the scheme is no less a lottery because the result depends upon the choice or selection of the managers. State v. Shorts, 32 N. J. L. 398; Trout v. State, *supra*. In Dunn v. People, 40 Ill. 465, it was shown that the defendant was conducting a "gift sale" establishment. He kept upon his desk, at his place of business, a box of envelopes purporting to contain valuable receipts and a card describing some article of value, all of which articles were to be sold for $1 each, without regard to value. The court held that the sale of one of these envelopes was the sale of a lottery ticket, as the element of chance did not lie in what the holder of the envelope might knowingly do with his card and dollar after he had purchased his envelope, but in the purchase of the envelope itself.

The payment of money in what is known as "playing policy," that is, upon the selection of certain numbers, which, if drawn, entitle the person to a larger sum, was held to be the purchase of an interest or share in a lottery within the meaning of the New York statute. Wilkinson v. Gill, 74 N. Y. 63. And in Poe v. Elliott, 41 N. Y. Rep. 916, it was held that a conviction would be sustained that was had under information charging a setting up and promoting of a lottery for money, where the evidence showed that the defendant had carried on the business called "policy." The courts have put a like construction on the character of the enterprises conducted upon the plan of distributing prizes by lot to all who became connected with the organization by paying certain sums of money for membership (Bell v. State, 37 Tenn. 507), such as picture drawings (State v. Shorts, 3 Vroom, 398; Thomas v. People, 59 Ill. 160); art unions (Almshouse v. Art Union, 7 N. Y. 228), and various gift enterprises. State v. Clark, 33 N. H. 329.

The personal participation of the party paying in the act of casting or drawing the lot will not make it any less a lottery. Fleming v. Bills, 3 Oreg. 286. And in State *in rel.* of Reaslee v. Sheriff, 10 Phil. Rep (Pa.) 202, it was held that selling packages of prize candy at five cents each, some of which contained coupons entitling the holder to a small sum of money, was a lottery scheme. See also Territory v. Harris, 8 Mont. T. 140. In United States v. Zeigler, 30 Fed. Rep. 499, it was held that the mailing of circulars describing a scheme for drawing prizes by chance, by which a city induced the purchase of its bonds, was a mailing of lottery circulars, and as such unlawful.

All these schemes and devices for evading the constitutional and statutory prohibitions of lotteries have been strictly construed, and if the element of chance appears, the scheme is held to be in violation of the lottery law and punishable in the manner prescribed. Furthermore, all contracts that are tainted by lottery connections will be held to be illegal as against public policy, and therefore void. A note given in consideration of the purchase of a chance in an illegal lottery drawing cannot be collected. Clark v. Harms, 1 A. K. Marsh. (Ky.) 198. A conveyance of land in a State prohibiting lotteries, if founded on a lottery drawing in a State authorizing such schemes, will be held to be void. Ridgeway v. Underwood, 4 Wash. (C. C.) 129. Rents reserved under a lease of premises for the sale of lottery tickets, an illegal occupation, cannot be recovered. Edelmuth v. McLarren, 4 Daly (N. Y.), 467. See Colyer v. Ransom, 4 Bibb (Ky.), 552. And an action will not lie for money obtained for lottery tickets. Udell v. Metcalf, 5 N. H. 396. See also Rothrock v. Perkinson, 61 Ind. 139; Morton v. Fletcher, 2 A. K. Marsh. (Ky.) 138; Lanahan v. Pattison, 1 Flip. (U. S.) 410; Williams v. Woodman, 8 Pick. (Mass.) 78.

The decisions of the courts on all questions relating to the indictment or information, and the character of evidence required to sustain a conviction for conducting a lottery business, are in the main based on the well established principles of criminal jurisprudence. Therefore the indictment, as a rule, will withstand a motion to quash, if it charge the offense in the language of the statute, or terms substantially those of the statute. Ritter v. State, 111 Ind. 324; Trout v. State, 10 W. Rep. 803; Howard v. State, 87 Ind. 68. The indictment or information should specify the name of the lottery and the number of tickets sold and delivered. Commonwealth v. Gillespie, 7 S. & R. (Pa.) 469. But it need not disclose the name of the prosecutor entitled to a portion of the penalty. State v. Willis, 78 Me. 70. It must show on its face that the lottery was an illegal one. Commonwealth v. Manderfield, 8 Phila. Rep. (Pa.) 440. An indictment for inserting an advertisement of a lottery in a newspaper published in another State but circulated in this State, must aver that defendant was interested in the circulation in this State. State v. Willis, 78 Me. 70. The indictment will be enforced if it charges the defendant with selling or vending a lottery ticket purporting to entitle the holder to a prize, share or interest in a prize to be drawn in a named lottery; giving a general description of the ticket, and averring that the vending was unlawful. Commonwealth v. Bierman, 13 Bush (Ky.), 345. And in State v. Kaub, 19 Mo. App. 149, it was held that a criminal information which charges the "wrongful and unlawful sale of a certain share or shares in a lottery and device in the nature of a lottery, known as the 'Louisiana State Lottery,'" is sufficient. In The State v. Yoke, 19 Mo. App. 582, it was held that the information for selling lottery tickets need not give the name of the purchaser, and it is immaterial that the lottery ticket appears to be a ticket of admission to a concert. If the ticket set out in the indictment does not appear on its face to be a ticket, it may be averred and proved as such. State v. Willis, 78 Me. 70.

RECENT PUBLICATIONS.

BOOKS RECEIVED.

A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS, including Practice and Forms. By Lewis Hochheimer, of the Baltimore Bar. Second Edition. Baltimore: Harold B. Scringer. 1891.

NEGLIGENCE OF IMPOSED DUTIES, PERSONAL. By Charles A. Ray, LL. D., Ex-chief Justice of the Supreme Court of Indiana. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1891.

HUMORS OF THE LAW.

Counsel. What is the plaintiff's attitude as to this question?

Witness. Recumbent. Lies about it constantly.

Here is a portion of the examination to which an old lawyer told me he was subjected when he applied for a license. The oldest member of the examining committee interrogated him:

"Are you familiar with any game of chance?"

"No, sir."

"Don't you know how to play any game of cards?"

"No, sir."

"Surely you understand euchre?"

"Never heard of it before."

"It can't be possible you never indulged in a game of draw poker?"

"Yes, sir, it can. I am a member of the church and and don't know one card from another."

"Well (after a long pause of astonishment) young man, we'll give you a license, but how in the world you're going to make a living for the first two or three years after you start to practicing law is a mystery to us."—*Dallas News.*

A frontier coroner recently reasoned out a verdict more sensible than one half the verdicts rendered. It appears that an Irishman conceiving that a little powder thrown upon some green wood would facilitate its burning, directed a small stream from a keg upon the burning pile; but not possessing a hand sufficiently quick to cut this off was blown into a million pieces. The following was the verdict, delivered with great gravity by the official: "Can't be called suicide, bekase he didn't mean to kill himself; it wasn't 'visitation of God,' bekase he wasn't struck by lightning; he didn't die for want of breath, for he hadn't anything left to breath with; it's plain he didn't know what he was about, so I shall bring in: Died for want of common sense."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Order for Distribution.—The only record evidence of an attempted distribution of intestate's estate was a credit taken by the husband in his account as administrator for balance of estate retained by himself for life, "with remainder to his children." *Held*, that it was insufficient distribution of the remainder to intestate's children, and therefore, on the death of the husband, the unadministered part was properly ordered sold, under the provisions of Code Pub. Gen. Laws Md. art. 93, § 137, for the purposes of final distribution.—*Woelfel v. Evans*, Md., 22 Atl. Rep. 71.

2. ADMINISTRATOR'S SALE OF LANDS.—Civil Code Ky. § 125, provides that a petition for the recovery of land, or for its subjection to a demand of the plaintiff, must describe it so that it may be identified; and where the description in administrator's deed does not conform to the description in the petition for the sale of land to pay the debts of the estate, the deed is void, and the subsequent confirmation of it by the court does not give it validity.—*Blackwell v. Townsend*, Ky., 16 S. W. Rep. 587.

3. ADMIRALTY—Jurisdiction.—Injury to a seaman from explosion of steam-tug boiler, due to negligence of the owner of the vessel, is actionable in admiralty.—*Grimsley v. Hankins*, U. S. D. C. (Ala.), 46 Fed. Rep. 400.

4. ADMIRALTY—Maritime Contracts.—A contract with the owners to supply their vessels for the period of a year with all the provisions they might require while in the port where the supplies are to be furnished, is not a maritime contract, and a court of admiralty has no jurisdiction of a suit for damages for its breach by the ship owners.—*Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, U. S. D. C. (La.), 46 Fed. Rep. 397.

5. ADVERSE POSSESSION—Boundaries.—While the legal title remains in the government, the statute of limitations will not run for any purpose in favor of one in possession of land, without right, and under Act. Cong. June 6, 1874 (Laws 43d Cong. p. 62), granting, releasing, and relinquishing certain lands "to the respective owners of the equitable title thereto and to their heirs and assigns forever," the statute of limitations cannot be considered as determining who were the owners of the equitable title.—*Smith v. McCorkle*, Mo., 16 S. W. Rep. 602.

6. ANIMALS—Injury.—In Alabama, the common law rule that the owner of domestic animals must keep them in his own close is reversed, and animals are permitted to run at large. Hence, if a land-owner main-

tains an unlawful fence, and such animals are injured thereby, he is liable to the owner.—*Hurd v. Lacy*, Ala., 9 South. Rep. 378.

7. APPEAL—Service of Notice—Waiver.—Where the appellate court has jurisdiction of the subject matter, a voluntary appearance by respondent, and taking steps in the cause in the appellate court, is a waiver of a mere irregularity in the service of the notice of appeal.—*Holden v. Haserodt*, S. Dak., 49 N. W. Rep. 97.

8. ASSIGNMENT—Litigous Right.—Where a person contracts to sell his land to one, and afterwards contracts to sell the same land to another, and assigns to this other the right to bring a suit to set the first contract aside for fraud, the holder of the contract cannot, if the landowner withdraws his consent, maintain a suit to set the first contract aside, as the assignment of a bare right to file a bill in equity for fraud committed on the assignor is void, as being against public policy.—*Illinois Land & Loan Co. v. Speyer*, Ill., 27 N. E. Rep. 931.

9. ASSUMPSIT—Quantum Meruit.— Under a contract by plaintiffs to furnish defendants with gas for fuel, defendants are not entitled to use gas for illumination after notice by plaintiffs not to do so, though they have previously been allowed to so use it and where they continued to so use it, plaintiffs may recover whatever the gas so used is reasonably worth, and are not limited to the price fixed in the contract for gas for fuel.—*Philadelphia Co. v. Park Bros. & Co.*, Penn., 22 Atl. Rep. 86.

10. ATTACHMENT—Chattel Mortgage.—An affidavit for attachment, alleging that defendant had disposed of his property with intent to defraud his creditors, is not sustained by proof that he had executed a chattel mortgage in good faith to secure advances.—*Campbell v. Jackson*, Wis., 49 N. W. Rep. 121.

11. ATTACHMENT—Fraud. — Under Sess. Laws Wash. 1886, § 3, providing for an attachment upon causes of action not due, where the defendant has made a fraudulent disposition of his property, the allegation as to such disposition is material, and must be proved, in order to justify the bringing of the action before the claim is due.—*Cox v. Dawson*, Wash., 26 Pac. Rep. 973.

12. ATTACHMENT — Statute of Frauds. — Under Code Ala. § 1732, subd. 5, which excepts from the operation of the statute of frauds parol contracts for the sale of land where "the purchase money, or a part thereof, is paid, and the purchaser put in possession of the land," an attachment will issue for the balance of purchase money of land, though the purchaser never executed any written agreement to purchase.—*Steadham v. Parrish*, Ala., 9 South. Rep. 358.

13. ATTACHMENT OF PROPERTY.—Where land has been levied upon under an order of attachment against a defendant, and such defendant has no title, estate, or interest in the land attached, the district court may, upon the motion of the person owning the same, and sufficient facts to establish that fact, discharge the property from the attachment.—*Dearborn v. Vaughan*, Kan., 26 Pac. Rep. 1038.

14. ATTORNEY AND CLIENT—Contingent Fees—Evidence.—In an action for attorney's fees, where it is alleged in one count of the complaint that the services were reasonably worth $1,500, of which $500 had been paid, and in another count that they were rendered for the agreed price of $500, and the further sum of $1,000 in case of success, and the answer denies the reasonable worth, and alleges that the agreement was for $500 and no more evidence as to what would be a reasonable contingent fee in such case is irrelevant.—*Ellis v. Woodburn*, Cal., 26 Pac. Rep. 963.

15. BANKS—Special Deposits — Evidence. — Where a bank is sued for the conversion of bonds which had been specially desposited with another bank, by which they were transferred to the defendant, the admissions of the cashier of the other bank while it held the bonds are admissible against the defendant on account of the privity of title between it and the other bank.—*First Nat. Bank v. Strang*, Ill., 27 N. E. Rep. 903.

16. BILL OF EXCHANGE.—A bill of exchange drawn by a corporation in favor of itself, and by it indorsed in blank is payable to bearer, within the meaning of the statute restricting the jurisdiction of circuit courts in actions on negotiable instruments. — *Bank of British North America v. Barling*, U. S. C. C. (Cal.), 46 Fed. Rep. 857.

17. CARRIERS—Freight—Bills of Lading.—Where a carrier executes bills of lading acknowledging the receipt of a certain quantity of wheat on board, and stipulating that "all the deficiency in the cargo to be paid by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," the carrier must pay for any deficiency in the quantity acknowledged by the bill of lading to have been received, though it delivers all the wheat it actually did receive.—*Rhodes v. Newhall*, N. Y., 27 N. E. Rep. 947.

18. CARRIERS — Passengers — Negligence.— Evidence that plaintiff was injured by the derailment of a car on which he was a passenger entitles him to recover, unless defendant reasonably satisfies the jury that the derailment was not due to negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier.—*Montgomery & E. Ry. Co. v. Mallette*, Ala., 9 South. Rep. 363.

19. COMMUNITY PROPERTY—Wife's Separate Estate.—During his first marriage the husband owned land, which he sold during the life of his second wife, and bought the land in controversy. It does not appear what he did with the proceeds of the first place, nor that any of it was used in the purchase of the land in controversy. *Held*, that the latter was community of the second marriage.—*McDougal v. Bradford*, Tex., 16 S. W. Rep. 619.

20. CONSTITUTIONAL LAW—Division of County.—An act to divide a county, and attach the part cut off to another county, without submitting the proposition to a vote of the people in the segregated part, is in violation of section 3, art. 18, of the constitution.—*People v. George*, Ida., 26 Pac. Rep. 983.

21. CONSTITUTIONAL LAW.—Special Legislation.—"An act to authorize cities of the second class to extend the term of office and fix the rate of compensation of certain officers therein," passed May 3, 1889, is local and special, in regulating the internal affairs of cities, within the constitutional prohibition.—*State v. Simon*, N. J., 22 Atl. Rep. 120.

22. CONTRACT—Construction.—Evidence of the practical construction given to a contract by the parties thereto in their dealings under it may be considered in determining the proper construction.—*Hosmer v. McDonald*, Wis., 49 N. W. Rep. 112.

23. CONTRACT—Construction.—One who receives from another certain coupons, with the understanding that they are to be collected when due, and the proceeds remitted to him, if living, and, if not, to be kept as compensation for services rendered, becomes entitled to the coupons not due and proceeds not remitted at the time of death.—*Tyndale v. Randall*, Mass., 27 N. E. Rep. 882.

24. CONTRACT—Place of Performance.—A note dated at S. was in fact made and delivered in New York. The maker was a resident of S and the payee of New York. The note provided for interest at 7 per cent., which is usurious in New York. There was no evidence as to where the indebtedness was incurred, or where the consideration for which the note was given passed: *Held*, that from the date on the note it would be presumed that it was to be paid at S, and that, under the rule that a contract is governed by the law of the place of performance, the note would be valid under the law of Iowa authorizing that rate of interest.—*Bigelow v. Burnham*, Iowa, 49 N. W. Rep. 104.

25. CONTRACT FOR SALE OF LANDS.—A parol contract for the sale of lands by which it was agreed that the possession taken under a lease existing between the parties should be continued under the purchase, and where part of the purchase money was paid, is not within the statute of frauds.—*Frank v. Riggs*, Ala., 9 South. Rep. 359.

26. CORPORATIONS — Subscriptions — Fraudulent Releases.—A fraudulent release by a corporation of an unpaid subscription to an increase in the capital stock of a corporation is void even against a debt arising before the increase.—*Carter v. Union Printing Co.*, Ark., 16 S. W. Rep. 579.

27. CREDITORS' BILL—Joinder of Complaints.—Where a creditor files a bill for himself and such other creditors as may join as complainants, any other creditor of the defendant should be permitted, on petition, to join in the suit as co-complainant.—*Belmont Nail Co. v. Columbia Iron & Steel Co.*, U. S. C. C. (Penn.), 46 Fed. Rep. 336.

28. CRIMINAL PRACTICE—Gaming—Indictment.—Under Code Ala. § 4899, form 16, providing that an indictment for card playing is sufficient which alleges that a person "bet at a game played with cards at a tavern," etc., an indictment in such form is sufficient though it does not state that the game was played at such place.—*Rosson v. State*, Ala., 9 South. Rep. 357.

29. CRIMINAL PRACTICE—Subornation of Perjury.—An information for subornation of perjury which fails to state that the false affidavit or testimony of the suborned witness was used, or procured to be used, in some cause, matter, or proceeding before some court, tribunal, or public body or officer, is fatally defective.—*State v. Geer*, Kan., 26 Pac. Rep. 1027.

30. CRIMINAL TRIAL—Homicide—Remarks of Counsel.—Reference by a prosecuting attorney to the circumstances of cases of homicide in which there were convictions for murder, with a view to persuade the jury that defendant is guilty of the same degree of offense, is improper, but not ground for reversal, where, under the evidence, there was either murder or no offense.—*Duncan v. Commonwealth*, Ky., 16 S. W. Rep. 584.

31. CRIMINAL TRIAL—Verdict.—Where the jury separate after agreeing on a sealed verdict, it is reversible error for the court, the next morning, on the jury bringing in a verdict of guilty which fails to fix the punishment, to direct the jury, over the defendant's objection, to retire again and complete their verdict.—*Farley v. People*, Ill., 27 N. E. Rep. 927.

32. CRIMINAL TRIAL — Witnesses —Accessories.—Pen. Code Tex. art. 91, provides that persons charged as principals, accomplices, or accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another: *Held*, that where a party was charged by affidavit jointly with the defendant with murder, but no indictment was found against him, he was competent to testify.—*Scroggin v. State*, Tex., 16 S. W. Rep. 651.

33. DEEDS—Construction.—In a conveyance to "the heirs" of H, a living person, and the grantor's son, who has at the time living children, where the deed is in terms immediate, and recognizes the fact that H is then living, and reserves a life-estate in the grantor, and, after his death in H, the words "the heirs" mean the children of H.—*Heath v. Hewitt*, N. Y., 27 N. E. Rep. 959.

34. DIVORCE—Counsel Fees.—The prosecution of a suit for divorce is not essential to the protection of a wife who is separated from her husband, and is not a necessary for which she can pledge his credit; and counsel fees for services rendered her in such an action, which is subsequently compromised, cannot be recovered in an action against her husband.—*Kincheloe v. Merriman*, Ark., 16 S. W. Rep. 578.

35. EJECTMENT—Adverse Possession.—Where one had been in continuous, open, notorious, and adverse possession of land from 1862 to 1888, and was then dispossessed by one claiming title by conveyance of the latter date, he may lawfully enter and maintain ejectment.—*Murray v. Hoyle*, Ala., 9 South. Rep. 367.

36. EMINENT DOMAIN—Compensation.—In an action to determine the value of certain town lots condemned for the right of way of a railroad, the opinions of witnesses, as to the value of the lots at the time they were condemned, will not be deemed conclusive, but the jury may consider such opinions in connection with all the other testimony in the case, and then, for itself, determine from all the testimony the value of such lots.—*Chicago, etc. R. Co. v. Drake*, Kan., 26 Pac. Rep. 1039.

37. EMINENT DOMAIN — Railroad Companies.—Under Rev. St. Ill. ch. 24, art. 5, § 1, par. 25, which gives the city council power "to provide for and change the location, grade, and crossing of any railroad," within the city, a railroad company, which has accepted a city ordinance locating the line of its road through the city, cannot acquire title by condemnation proceedings to land in the city not included within such location.—*Tudor v. Chicago, etc. R. Co.*, Ill., 27 N. E. Rep. 915.

38. EQUITY—Adequate Remedy at Law.—Where, in a suit in the territorial district court of Washington, judgment is rendered upon a stipulation of counsel made in contravention of defendant's instructions to his attorney, he has a proper and adequate remedy by a motion to vacate under the Code, and equity will not take jurisdiction of a bill to annul and enjoin the execution of the judgment filed before the time within which a motion to vacate could have been made had expired.—*Cowley v. Northern Pac. R. Co.*, U. S. C. C. (Wash.), 46 Fed. Rep. 325.

39. EXECUTION— Community Property. — Where the husband consents to the issuance and levy of a writ of attachment upon community property which is exempt, and there is no complaint by the wife that it was fraudulently done to deprive her of the privilege, the exemption will be deemed to have been waived.—*Dodge v. Knight*, Tex., 16 S. W. Rep. 626.

40. EXECUTION—LEVY.—Serving a copy of the execution, with the usual notice, upon the attorney of the judgment debtor, attorney of the execution debtor, and the justice of the peace who rendered the judgment, the judgment debtor being a non resident of the State, does not constitute a valid levy on the judgment.—*McLaughlin v. Alexander*, S. Dak., 49 N. W. Rep. 99.

41. FEDERAL COURTS—Jurisdictional Amount.—In a proceeding to set aside certain conveyances as fraudulent and a cloud upon the plaintiffs' title, the "matter in dispute," within the meaning of Act Cong. Aug. 13, 1888, limiting the jurisdiction of the United States circuit court, is the value of the land.—*Simon v. House*, U. S. C. C. (Tex.), 46 Fed. Rep. 317.

42. FEDERAL COURTS—Riparian Rights.—Riparian or littoral rights are not an appurtenance of the land, but a mere incident of its ownership, arising out of the local or common law; and a grant by the United States of the land is not such a conveyance of the riparian rights as will give jurisdiction to a federal court of a contest over such rights, as involving a federal question.—*Kenyon v. Knipe*, U. S. C. C. (Wash.), 46 Fed. Rep. 309.

43. FORCIBLE ENTRY AND DETAINER— Certiorari.—A writ of *certiorari* granted under Code Ala. 1886, § 795, by the judge of probate, returnable to the circuit court, on a judgment in forcible entry and unlawful detainer rendered by a justice of the peace, removes the cause into the circuit court for a trial *de novo*, and that court will not afterwards entertain a motion to dismiss on account of defects in the petition for the writ.—*Wright v. Hurt*, Ala., 9 South. Rep. 386.

44. FRAUDS, STATUTE of—Verbal Personal Promise.—Where the receiver of an insolvent sells property for the benefit of the firm on which a creditor has a lien, and which is released upon the personal verbal promise of the receiver to pay therefor, the promise is without consideration, and void, under Rev. St. Wis. § 2307, subd. 2.—*Bray v. Parcher*, Wis., 49 N. W. Rep. 111.

45. FRAUDULENT CONVEYANCES.—A conveyance made by a debtor with intent to hinder and delay his creditors cannot be impeached by his personal representative, unless the property so conveyed is actually required for the payment of his debts.—*McCall v. Pixley*, Ohio, 27 N. E. Rep. 887.

46. FRAUDULENT CONVEYANCES—Evidence.—Where, in an action to set aside for fraud a conveyance by a debtor to his wife, the answer admits the indebtedness and the subsequent transfer, and all the material allegations, except that such transfer was made without consideration and to defraud, the burden of disproving fraud rests upon defendant, and failure to allege facts relied upon by him as constituting the consideration precludes him from introducing any evidence thereof. —*Robinson v. Moseley*, Ala., 9 South. Rep. 372.

47. FRAUDULENT CONVEYANCES-Knowledge of Grantee. —An antecedent creditor, who knows that his debtor has procured goods and merchandise by fraudulent means, when the sale of such goods is partially induced by the representations of such antecedent creditor as to the credit of his debtor, cannot by a chattel mortgage secure a lien on such fraudulently procured goods, adverse to the innocent vendors of such goods. —*Wafer v. Harvey County Bank*, Kan., 26 Pac. Rep. 1032.

48. GAMING — Liability of Lessor.— The lessee of a building who sublets a portion thereof, and retains no control over it, is not guilty of permitting gaming in such portion, under Code Miss. § 2848, making it unlawful for "any owner, lessee, or occupant" of a building to knowingly permit gaming therein.—*Diebel v. State*, Miss., 9 South. Rep. 354.

49. GUARDIAN—Lunatic—Wife's Funeral Expenses.— Where the guardian of a lunatic pays the funeral expenses of the latter's wife, he is entitled to reimbursement out of the proceeds of the sale of his ward's real estate, although the wife by will directed that such expenses should be paid from her separate estate.—*In re Stewart*, N. J., 22 Atl. Rep. 122.

50. HIGHWAYS—Obstruction.—One who is in the possession of land, using and cultivating it, is presumed to be the owner, though he does not live on the land, and he cannot be convicted for obstructing a road opened through the land without compensation.—*Meers v. State*, Tex., 16 S. W. Rep. 653.

51. INJUNCTION—Adequate Remedy at Law.—Where a city has filled in a cellar built underneath a sidewalk by an adjoining land owner, a bill by the latter, alleging that the city contracted to allow him to build and use such cellar, and praying an injunction and damages, cannot be maintained, where it fails to show any irreparable injury, or that there is no adequate remedy at law.—*Winter v. City Council*, Ala., 9 South. Rep. 366.

52. INJUNCTION—Sale of Lands.—In an action to restrain the sale of land under execution against plaintiff's grantor the court should continue the restraining order pending final determination, and it is an abuse of discretion to dissolve it upon the filing of and answer denying the allegations of the bill.—*Porter v. Jennings*, Cal., 26 Pac. Rep. 965.

53. INJUNCTION— Water-rights. — A land-owner may have an injunction against a stranger, who, under claim of right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.—*Walker v. Emerson*, Cal., 26 Pac. Rep. 968.

54. INJUNCTION BOND—Surety.—An order, entered by consent, modifying an injunction so as to make it less comprehensive than before does not release the surety on the injunction bond from liability upon dissolution of the injunction as modified, since the modification does not increase his liability.—*Brackebush v. Dorsett*, Ill., 27 N. E. Rep. 983.

55. INTOXICATING LIQUORS—Criminal Prosecution.—In prosecutions for selling intoxicating liquor in violation of the prohibitory law, when the information is not verified by the oath of the county attorney, and there is filed with it the testimony of a private person at an examination made by the county attorney, the defendant cannot be found guilty of any offense except one of which the person who was examined by the county attorney had notice or knowledge at the time of his examination.—*State v. Hescher*, Kan., 26 Pac. Rep. 1022.

56. INTOXICATING LIQUORS — Illegal Sale.—Under an ordinance licensing saloons and forbidding any business therein "between 11 o'clock P. M. and 5 o'clock A. M. of each and every day," no recovery can be had on a bond conditioned for the lawful conduct of the business, under a complaint charging the saloon keeper with selling liquors between 11 o'clock P. M. and 5 o'clock A. M. of the "following" day.—*City of Eureka v. Diaz*, Cal., 26 Pac. Rep. 961.

57. INTOXICATING LIQUORS—Sale to Minor.—It is no defense to an indictment for selling liquor to a minor without the written consent of his parent or guardian, as required by Mansf. Dig. Ark. § 1878, that the father of the minor was present when the sale was made, and gave his oral consent thereto.—*Blahut v. State*, Ark., 16 S. W. Rep. 582.

58. JOINT TENANCY—Survivorship.—Even where a deed to two persons states that the land is conveyed to them, "not as tenants in common, but as joint tenants," there is no right of survivorship under Rev. St. Ill. ch. 76 § 1. —*Mette v. Feltgen*, Ill., 27 N. E. Rep. 911.

59. JUDGMENT — Confession — Rent. — Under Rev. St. Ill. ch. 110, § 66, which provides that any person may confess judgment without process for a debt *bona fide* due, a confession of judgment entered by attorney for rent due under a lease containing authority for any attorney to confess judgment for the tenant "for any rent which may be due by the terms of this lease," is void where the lease provides that all sums paid by the landlord for water or gas or for cleaning the demised premises shall be "so much additional rent," since power cannot be given to confess judgment on an unliquidated claim.—*Little v. Dyer*, Ill., 27 N. E. Rep. 905.

60. JUDGMENT—Injunction.—Injunction will not lie to restrain the enforcement of a judgment alleged to have been irregularly affirmed on certificate in the supreme court, in violation of an agreement of settlement in consequence of which the appeal was abandoned, when it appears that there is still time to set aside the affirmance at the term at which it was entered.—*J. A. Roebling Sons Co. v. Stevens Electric Light Co.*, Ala., 9 South. Rep. 369.

61. JUSTICE OF THE PEACE.—In an action before a justice of the peace that had been continued to a day certain by the agreement of both parties, an attorney for the defendant has no right to rely on a promise of the justice that the case should not be called for trial until the attorney had been notified.—*Snively v. Hill*, Kan., 26 Pac. Rep. 1042.

62. LANDLORD AND TENANT—Damages.—Under Civil Code Cal. § 3300, providing that for breach of contract the measure of damages is that amount which will compensate the party for all detriment proximately caused thereby, a landlord whose premises are abandoned by his tenant, and who thereupon leases the same to another, can recover as damages only the difference between the amount he should have received under the first lease and that which he actually did receive under the second.—*Respina v. Porta*, Cal., 26 Pac. Rep. 967.

63. LANDLORD AND TENANT — Lease—Forfeiture.—An entry effected by misrepresentations and collusion with the occupant's servants will not support a bill in equity to quiet title.—*Wakefield v. Sunday Lake Min. Co.*, Mich., 49 N. W. Rep. 135.

64. LANDLORD AND TENANT—Negligence.—Where one is injured by the falling of the fire-walls and cornice of a building, portions of which are leased to several tenants, the owner of the building is liable, where it does not appear that the portions falling were within the holding of any particular tenant, and no agreement

that repairs should be made by the tenants is shown.—*O'Connor v. Andrews*, Tex., 16 S. W. Rep. 628.

65. LIFE INSURANCE—Assignment-Insurable Interest.—A policy of insurance on the life of a married woman was assigned by her and her husband to one of the husband's creditors, and was assigned by such creditor to one having no insurable interest in the woman's life. *Held*, that such second assignee acquired no interest by the assignment, it being contrary to public policy that any one should have insurance on the life of another in whose life he has no insurable interest.—*Kessler v. Kuhns*, Ind., 27 N. E. Rep. 960.

66. LIFE INSURANCE—Guardian and Ward.—Where the contract of insurance does not require the claimant to furnish proof of the cause of death, an infant beneficiary is not bound by the admission of his guardian, who, in furnishing the proofs of death, voluntarily included the attending physician's certificate of the cause of death which showed that the insured died from one of the excepted causes.—*Buffalo Loan, etc. Co. v. Knights Templar etc.*, N. Y., 27 N. E. Rep. 942.

67. LIMITATION OF ACTIONS.—An action against one formerly plaintiff's guardain, and administrator of his father, for alleged fraudulent misappropriation of money received in such capacities, is barred by limitations where the administration was closed 26 years, and plaintiff reached his majority 13 years, prior to the commencement thereof.—*Lane v. Lane*, Ga., 13 S. E. Rep. 335.

68. MALICIOUS PROSECUTION—Probable Cause.—Under Rev. St. Wis. 1878, § 4791, in a civil action by a woman for a malicious prosecution for adultery, the judgment of a justice of the peace, discharging her, is admissible, and is *prima facie* evidence of the want of probable cause; the section further providing that, if the magistrate finds that the complaint was willful and malicious, and without probable cause, he may enter judgment against the complainant for all the costs.—*Bigelow v. Sickles*, Wis., 49 N. W. Rep. 106.

69. MALICIOUS PROSECUTION—Probable Cause.—Upon the trial of an action for malicious prosecution the plaintiff, when attempting to establish a want of probable cause, is not confined to proof of such facts as he can affirmatively show were actually known to defendant, but may also prove the existence of such open and notorious facts as would or should have been ascertained by the latter, had he, before, instituting the proceedings, made such inquiry and investigation as any one with honest motives, and not actuated by malice, would have made.—*Tabert v. Cooley*, Minn., 49 N. W. Rep. 124.

70. MANDAMUS-Legislative Apportionment.-Where the governor, auditor, and secretary of State, or a majority of them, as the board of created by section 11, art. 11, of the constitution, for the decennial apportionment of the State for members of the general assembly, have made an apportionment, they cannot be required, by *mandamus* or otherwise, to make another apportionment, unless the apportionment as made so far disregards the principles prescribed by the constitution as to warrant the court in saying that it is no apportionment and should be treated as a nullity.— *State v. Campbell*, Ohio, 27 N. E. Rep. 884.

71. MECHANIC'S LIEN — Evidence—Waiver.—Where it appears from the evidence of the complainant, in a suit to foreclose a mechanic's lien, that a note, indorsed in blank by a third person, has been given for the amount due, the complainant cannot recover, in the absence of proof that such indorsement was not made by way of guaranty, since the presumption is that the indorsement was a guaranty, and the acceptance of a guarantied note is a waiver of the lien.—*Kankakee Coal Co. v. Crane Bros. Manuf'g Co.*, Ill., 27 N. E. Rep. 935.

72. MECHANIC'S LIEN—Priorities.—A person in possession of real estate under a verbal agreement to convey the fee-simple title to him is an owner thereof within the meaning of our statute relating to material-men's liens, and may subject his interest therein to such a lien.—*Meyer Bros. Drug Co. v. Brown*, Kan., 26 Pac. Rep. 1019.

73. MORTGAGES—Redemption.—Where land, sold under a mortgage given individually by the members of a partnership to secure a partnership debt, was the property of one partner only, a creditor having a judgment against such partner alone may redeem from the sale under Code Ala. 1886, § 1883, declaring that "all judgment creditors of the debtor" may redeem.—*Florence Land Min. & Manuf'g Co. v. Warren*, Ala., 9 South. Rep. 384.

74. MUNICIPAL CORPORATION—Boards of Education.—Outlying and adjacent territory attached to a city of the second class for school purposes is not entitled to elect members of the board of education of the city, to represent said territory, unless such territory contains a population equal to that of any one ward of the city, or its taxable property equals that of any one ward of the city.—*Jay v. Board of Education*, Kan., 26 Pac. Rep. 1025.

75. MUNICIPAL CORPORATION—Negligence—Notice.—In an action against a city for personal injuries caused by the defective condition of a culvert, an allegation that the "unsafe condition of said culvert had for a long time been well known to the municipal authorities" may be sustained by evidence that the culvert's unsafe condition had existed so long before the accident that the city officers might have discovered it by the use of reasonable diligence.—*City of La Salle v. Porterfield*, Ill., 27 N. E. Rep. 937.

76. MUNICIPAL CORPORATION — Officers de Facto.—Members of the board of city affairs, before the law was declared unconstitutional, were *de facto* members of the administrative board of Cincinnati, and their acts valid.—*Kirker v. City*, Ohio, 27 N. E. Rep. 898.

77. MUNICIPAL CORPORATION—Ordinance— Validity.—A smoke ordinance which exempts dwelling-houses and steam-boats from its operation, is not invalid on the ground that it unreasonably discrimates between classes.—*People v. Lewis*, Mich., 49 N. W. Rep. 140.

78. MUNICIPAL CORPORATION—Sewers—Special Assessment.—Under Rev. St. Ill. ch. 24, art. 9, § 1, which authorizes cities and villages "to make local improvements by special assessment," a village may levy a special assessment for the construction of a sewer which lies partly outside the corporate limits, where it is necessary to extend the sewer beyond such limits in order to obtain an outlet.—*Cochran v. Village of Park Ridge*, Ill., 27 N. E. Rep. 939.

79. MUNICIPAL CORPORATION — Special Assessment.—The fact that unplatted land within a city is used only for farming purposes, and that it will not be benefited as a farm by the construction of a proposed sewer, does not exempt it from liability for special assessment on account of such sewer, where it appears that the value of the land lies principally in its adaptability for suburban residences, and that its value for that purpose will be increased by the construction of such sewer.—*Leitch v. Village*, Ill., 27 N. E. Rep. 917.

80. MUNICIPAL CORPORATION—Suit for Taxes Paid.—Under the charter of the city of Mt. Clemens, which provides that all claims against it shall be verified and filed with the council before being allowed, and that it shall be a conclusive answer to any suit against the city that the claim had not first been presented to the council, such presentation is a condition precedent to maintaining a suit to recover taxes paid under protest.—*Crittenden v. City of Mt. Clemens*, Mich., 49 N. W. Rep. 144.

81. MUNICIPAL CORPORATION—Telegraph Lines.—A city cannot grant to a telegraph company the right to erect its line along a public street without first making compensation to the abutting property owners, since the line is an additional burden.—*Stowers v. Postal Telegraph-Cable Co.*, Miss., 9 South. Rep. 356.

82. MUTUAL BENEFIT SOCIETY—Insurance.—A mutua relief association, organized under the laws of Massa

chusetts, and having no capital stock, the purpose of which is to provide a fund from which a certain sum shall be paid on the death of its members, is an insurance company.—*Supreme Council v. Larmour*, Tex., 16 S. W. Rep. 633.

83. NEGLIGENCE—Venue of Suit.—Rev. St. Tex. art. 1198, subd. 8, providing that, where the foundation of the suit is some crime, offense, or trespass for which a civil action for damages will lie, it may be brought in the county where the act was committed, does not apply to an action for damages caused by negligence; and an action brought in such county against a resident of another county is not within the jurisdiction of the court.—*Ricker v. Shoemaker*, Tex., 16 S. W. Rep. 645.

84. NEGOTIABLE INSTRUMENT.—In an action on a note, it appeared that defendant had arranged with his creditors to execute to each his note payable a certain time *in futuro*, provided they all, as a condition precedent, would sign an agreement granting extensions on their claims: *Held*, that the execution and delivery by defendent of a note before the signing of such agreement constituted a waiver of the condition, and the subsequent failure of certain creditors to sign was immaterial.—*Garner v. Fite*, Ala., 9 South. Rep. 367.

85. NEGOTIABLE INSTRUMENT — Consideration— Bastardy.—It is no defense to an action on a note given in settlement of a prosecution for bastardy that the child died before its support cost the amount of the note, since the consideration for the note is not merely the support of the child, but also the dismissal of the prosecution.—*Marshall v. Bell*, Ind., 27 N. E. Rep. 988.

86. PARTNERSHIP—Mining.—Civil Code Cal. § 2442, providing that every general partner is jointly liable to third persons for firm debts, applies to members of a mining partnership.—*Stuart v. Adams*, Cal., 26 Pac. Rep. 970.

87. PARTNERSHIP—Firm Creditors.—The acquiescence of one partner in a mortgage by the other of the latter's "right, title, and interest" in the property to secure an individual debt will not defeat the equity of firm creditors to have the firm property applied to the payment of their debts.—*Reyburn v. Mitchell*, Mo., 16 S. W. Rep. 592.

88. PAYMENT.—A judgment was rendered against a guardian and his surety, and defendant, in behalf of the ward, went with the sheriff to levy on the surety's property, when the latter paid the judgment, and took an assignment thereof. Afterwards the guardian appealed, and the judgment was reversed, but defendant at the time of the levy was ignorant of the guardian's intention to appeal, and made no misrepresentations: *Held*, that the surety's payment was voluntary, and could not be recovered.—*Kalmbach v. Foote*, Mich., 49 N. W. Rep. 132.

89. PLEADING— Answer — Denial.—A denial of "any knowledge or information sufficient to form a belief" as to certain material facts alleged, is a good denial, and creates an issue to be tried.—*Colburn v. Barrett*, Oreg., 26 Pac. Rep. 1008.

90. PLEADING—Failure to Reply.—Where a paragraph of an answer containing a general plea of payment is not replied to, it is proper to enter judgment for the defendant, and the sufficiency of the other paragraphs of the answer is immaterial.—*Adams v. Tuley*, Ind., 27 N. E. Rep. 991.

91. POLICE COMMISSIONERS—Dismissal of Policeman.—In the summary proceedings of the board of police commissioners dismissing from service a patrolman, it must appear that they found him guilty, but no formal record of conviction need be kept.—*State v. Mayor*, N. J., 22 Atl. Rep. 123.

92. PRINCIPAL AND AGENT.—Notice by an attorney, acquired in another transaction, of the pendency of a suit, which may affect the title to real property, cannot be imputed to one who employs him for the sole and special purpose of examining an abstract of the title of the property, and giving an opinion as to its sufficiency.—*Trentor v. Pothen*, Minn., 49 N. W. Rep. 129.

93. PRINCIPAL AND AGENT—Scope of Agency.—A manufacturer wrote to a customer that for the next year he had 14 new patterns of furniture, and that "our Mr. W. will call on you early in January, and talk to you about handling the line next year." The agent called, and defendants claim to have bought old patterns of goods, which were not delivered: *Held*, the letter only gave authority to sell the new patterns, and the customer could not recover for a failure to deliver old patterns of furniture.—*McCord & Bradfield Furniture Co. v. Wollpert*, Cal., 26 Pac. Rep. 969.

94. PUBLIC LAND—Cutting Timber.—In an action of trespass by the United States for cutting timber on government land the burden of showing that the timber was cut by mistake, with a view of mitigating the damages, is upon the defendants; and, in the absence of evidence to that effect, there is no error in permitting the government to recover the value of the saw-logs when already brought to the water.—*United States v. Baxter*, U. S. C. C. (Wash.), 46 Fed. Rep. 350.

95. RAILROAD COMPANIES.—A "dummy" railway, laid in the streets of a city, and engaged exclusively in carrying passengers, is a "railroad," within Code Tenn. § 1298, which provides that "every railroad shall keep some person upon the locomotive always upon the lookout ahead; and, when any obstruction appears upon the road, the alarm whistle shall be sounded, and every possible means employed to prevent an accident.—*Katzenburger v. Lano*, Tenn., 16 S. W. Rep. 611.

96. RAILROAD COMPANIES.—Code Tenn. § 1298, providing that every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, does not permit of the running a train with the engine in the rear, even with a lookout in front, so as to avoid the conditions of section 1299, that a company shall be liable for damages from failure to observe such precautions, and of section 1300, that proof of their observation shall be on the company.—*Little Rock & M. Co. v. Wilson*, Tenn., 16 S. W. Rep. 613.

97. RAILROAD COMPANIES — Negligence. — A person traveling in a public street, and finding it obstructed by a freight train at full stop, to which a locomotive is attached, who relying upon the assurance of a brakeman that he can safely climb over the bumpers, and pass between the cars, as the train will remain stationery for some time, attempts to do so, and while in the acts suffers an injury by the train being started suddenly, without warning by ringing the bell or sounding the whistle, is guilty of such contributory negligence as will prevent his recovery for the injury.—*Renner v. Northern Pac. Ry. Co.*, U. S. C. C. (Wash.), 46 Fed. Rep. 344.

98. REAL ESTATE BROKERS—Agent.—A real-estate broker employed either generally to purchase land, or specially to obtain prices, must be considered as primarily the agent of the vendees though he afterwards acts or assumes to act for the vendor.—*Marsh v. Buchan*, N. J., 22 Atl. Rep. 128.

99. RECEIPT—Effect of.—A receipt in full is a complete bar to an action, in the absence of evidence of fraud, mistake, or non-payment.—*Virdin v. Stockbridge*, Md., 22 Atl. Rep. 70.

100. RECEIVERS—Attachment.—Where an action in attachment is commenced in one county after the appointment of receiver in a suit in another county against the same defendant, the levy is void, although the receiver did not qualify and take possession until after levy; and the subsequent dismissal of the latter suit will not restore the attachment lien where it appears that, before dismissal, the court had appointed another receiver in an action to foreclose a mortgage in which the claims made in the suit in which the first receiver was appointed were adjusted.—*Texas Trunk Ry. Co. v. Lewis*, Tex., 16 S. W. Rep. 647.

101. REMOVAL OF CAUSES—Application.—Where, in an action on an insurance policy, it appears that the policy was assigned by the insured to a third person, who as

signed it to one of the parties to the action, a petition for removal on the ground of diverse citizenship, which fails to show the citizenship of such third person, is not sufficient to warrant removal.—*McNulty v. Connecticut Mut. Life Ins. Co.*, U. S. C. C. (Iowa), 46 Fed. Rep. 305.

102. REMOVAL OF CAUSES — Local Prejudice.—Under the removal act of 1887, as amended in 1888, which provides that a cause may be removed on the ground of local prejudice "at any time before the trial thereof," an application for removal on the ground of local prejudice comes too late when made after a trial on the merits has been entered upon, though the jury were discharged without agreeing on a verdict.—*Davis v. Chicago, etc. Ry. Co.*, U. S. C. C. (Iowa), 46 Fed. Rep. 307.

103. REPLEVIN — Evidence. — Where plaintiffs in replevin claim the property under a chattel mortgage given to secure advances, and try the case on that ground, and defendants claim under a prior mortgage, plaintiffs cannot, after resting their case, introduce evidence to show that the mortgagor had never had any title, but that plaintiffs had acquired the title from third persons, especially where no such allegation is made in the complaint.—*Campbell v. Dick*, Wis., 49 N. W. Rep. 120.

104. RES ADJUDICATA.—Where a bill in equity against a husband and wife charges that she was the owner of certain lands as her separate estate, and executed a note to the plaintiff, thereby charging the land for its payment, and the court finds the facts to be as stated and decrees a sale of the land, the sale cannot be collaterally attacked on the ground that the wife's title to the land was a simple legal estate, which could not be charged for debts contracted by her.—*Hope v. Blair*, Mo., 16 S. W. Rep. 595.

105. SALE—Bill of Sale—Parol Evidence.—Where a bill of sale is absolute in its terms of transfer, states the quantity and price of each class of property, and the total price, with a provision for the correction of mistakes as to quantity, and contains an agreement as to how the price is to be applied between the parties, and the vendee takes possession thereunder, parol evidence is not admissible to show that it was intended merely as collateral security.—*Thomas v. Scutt*, N. Y., 27 N. E. Rep. 963.

106. SET-OFF—Loans to Agent.—Under an agreement by a principal to "lend and advance" a certain sum per month to his agent, "which sum shall be a lien, until discharged, upon his commissions aforesaid," sums so loaned constitute a valid set off, in an action by the agent for commissions.—*Johnston v. United States Life Ins. Co.*, Mass., 27 N. E. Rep. 882.

107. SLANDER—Evidence.—Where the slander charged is a statement that plaintiff had "confessed that she stole the money," the introduction of evidence as to whose money the witnesses understood to be referred to is not prejudicial error, since the reference to the owner of the money does not aggravate or mitigate the charge of stealing.—*Hintz v. Graupner*, Ill., 27 N. E. Rep. 935.

108. STARE DECISIS—Decree.—If a decree be rendered against a party while under duress, so that such party is unable to conduct his or her case properly, the remedy of such party is to apply to the court in such case to be relieved from the decree as soon as such duress is removed. A party cannot at the same time take advantage of the decree which results favorably to him and object to another part of it on the ground of duress, when it is alleged that the entire decree was procured while such party was under duress.—*Ross v. Ross*, Oreg., 26 Pac. Rep. 1007.

109. TAXATION—Declaration.—In an action of debt to recover delinquent taxes, the declaration must allege that the taxes sued for accrued within the county in which suit is brought. But such declaration need not aver by what authority the taxes were levied, or the particular municipality to which they were payable.—*Ottawa Gas-light, etc. Co. v. People*, Ill., 27 N. E. Rep. 924.

110. TAX-DEED—Quieting Title.—The omission of the county clerk to certify the record of delinquent real estate as required by Rev. St. Ill. ch. 120, § 914, invalidates a tax-sale made thereon, since the certificate is the process under which the sale is made.—*Glos v Randolph*, Ill., 27 N. E. Rep. 941.

111. TAXES—Collection.—Act Del. April 28, 1891, appointing a "receiver of taxes and county treasurer" for New Castle county, to collect the taxes for the whole county, and providing that the terms and powers of office of the collectors of taxes who had been appointed or elected by the levy court since February 1, 1891, should be terminated, and abolishing the office of collectors of taxes, did not take from the ex collectors of taxes their power to collect for two years after the date of their warrant all uncollected taxes included therein given them by former laws.—*Smith v. Riding*, Del., 22 Atl. Rep. 97.

112. TRIAL — Harmless Error.—An inapplicable, and therefore improper, instruction to the jury will not require or authorize a reversal of the judgment of the trial court, where such instruction could not have prejudiced any of the substantial rights of the complaining party.—*Ft. Scott, etc. R. Co. v. Karracker*, Kan., 26 Pac. Rep. 1027.

113. TRIAL—Special Verdict.—In an action for services in lending and collecting defendant's money during a period of 13 years, the jury should not be required to find specially the number of days that the plaintiff worked during each year, how much his services were worth each year, and how many loans and collections he made with the amounts and names, since that would be calling for evidentiary, rather than ultimate, facts.—*Heiney v. Garretson*, Ind., 27 N. E. Rep. 989.

114. TRUSTS—Equitable Lien.—An insolvent mercantile firm borrowed money from a bank on the strength of false representations as to their financial condition, and used the money, with other funds, in buying merchandise. The firm's assets were afterwards delivered to a receiver appointed in a suit between the partners. The bank intervened in the suit, and claimed a lien on the assets: *Held*, that it had no lien, since, though the false representations might change the firm's relation to the bank from that of debtor to that of trustee, there was no misappropriation or wrongful confusion of the trust fund.—*Union Nat. Bank v. Goetz*, Ill., 27 N. E. Rep. 907.

115. VENDOR AND VENDEE—Guardian and Ward.—Although a contract made by a guardian for the sale of his ward's land before obtaining leave of court to sell is not enforceable, yet, where the guardian afterwards obtain leave to sell, and is willing and able to convey good title within the time limited by the contract, the vendee cannot recover back money paid by him on account of the purchase.—*Morris v. Goodwin*, Ind., 27 N. E. Rep. 985.

116. WATER AND WATER-COURSES—Pasturing Cattle.—One who owns land through which a stream flows may pasture his cattle thereon though they befoul the water, and thereby injure the water company which is engaged in supplying fresh water from the stream below.—*Helfrich v. Catonsville Water Co.*, Md., 22 Atl. Rep. 72.

117. WILLS—Construction.—Code Ga. § 2454, provides that the word "lend," when occurring in a will, must be construed to mean "give," unless the context requires its restricted meaning: *Held*, that the words, "I loan to my wife" certain land "in lieu of dower," convey only a life-estate, when occurring in an item wherein testator also "gives and bequeaths" certain slaves to his wife, "to her and her heirs forever," and "gives and bequeaths" to her certain perishable property "in fee-simple."—*Britt v. Rawlings*, Ga., 13 S. E. Rep. 336.

118. WILLS—Devisees.—Where a will directs certain devisees to jointly pay the testator's debts, and such sum to another devisee as will equalize the several bequests, the acceptance of the bequests imposes a personal obligation upon the devisees, and creates no such trust as requires the aid of a court of chancery in making final settlement of the estate.—*Harland v. Person*, Ala., 9 South. Rep. 379.